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DEAN ROBERT J. FARLEY

*John H. Fox, Jr.**

One hundred ten years ago there was no law school at the University of Mississippi. Very shortly thereafter, in the very first "law class" at Ole Miss, Robert Joseph Farley was enrolled as a student. Thus the "Farley" tradition at Ole Miss law school began simultaneously with the beginning of the School of Law. *That* Robert Joseph Farley later gave his life to the cause of the Confederacy in the battle of Gettysburg. Fifty-three years later, his son, Leonard Jerome Farley, who, according to the custom then prevailing, was affectionately referred to by all his students as "Judge Farley," came to Oxford in 1910 to become Professor of Law and later, in 1913, was appointed Dean. He held this position until his death in 1921.

When Judge Farley moved his family from Hernando, Mississippi, to Oxford in 1910, there were three sons and four daughters, all of whom later graduated from Ole Miss. Among them was his son, Robert Joseph Farley, then twelve years old, a namesake of his grandfather, and known to all of Oxford and the University as "Bob."

Just before the session of 1918-1919, during World War I, while a student at Ole Miss, Bob Farley volunteered for military duty, was commissioned as a second lieutenant in the army, and sent back to Ole Miss as an officer in one of the three companies of the Students' Army Training Corps or S.A.T.C. Students promptly nick-named this outfit the Saturday Afternoon Tea Club. This was Bob Farley's senior year in the Liberal Arts College and the writer's first year in the Ole Miss Law School as a student during the Deanship of the universally beloved "Judge Farley." There was a fourth company of the S.A.T.C. composed of students who were misfits, flat-foots, non-age, over-aged, or otherwise disqualified from actual army service, but all of whom were required to participate in military training just as if attached to one of the regular companies. Thus the writer, being a member of this fourth company, in a sense, became adjusted as early as 1918 to being subject to orders from Bob Farley who was later to become his associate and Dean.

*Acting Dean and Professor of Law, University of Mississippi.

It was during this military regime that Bob Farley first endeared himself to Ole Miss law students. In the deadly "flu" epidemic of that year, the military allowed no one on the campus without exhibiting a pass. One morning Judge Farley strolled from his home in Oxford on his way to the campus for his class. On arrival at the famous University Bridge the guard on duty requested Judge Farley's pass. To his chagrin, he had left it at home in Oxford, and he requested admission *sans* pass. The guard passed the word for the Officer of the Guard, Lt. Farley, who, on arrival, politely and pertly, but with due paternal respect, sent Judge Farley home for his pass. Before he could get back, the time for his class had expired and his law students gleefully dispersed. The Judge never forgot his pass again, nor did law students ever forget Bob Farley, who at that early date demonstrated his impartial respect for law and orders.

The Ole Miss student body bestowed many honors on Bob Farley and in his senior year elected him as their Vice-President and Editor-in-Chief of the Ole Miss Year-book. On receiving his A.B. degree in 1919, he at first tried his hand serving as principal at the Canton and Natchez high schools for two years, and then, settling on his career in law, he re-entered Ole Miss, receiving his LL.B. degree in 1924. Before graduation his fellow citizens of Oxford elected him as their Mayor at the age of twenty-six; and while exercising the powers, privileges and prerogatives of his office, he took into custody a lovely Ole Miss co-ed, Alice Lockard, who was selected by her fellow students as "Miss Ole Miss." Mayor Farley, after proper pleading and hearing, placed her under Bond-of-Matrimony, a sentence she still serves with extreme grace and charm.

Immediately upon graduation he formed a law partnership in Oxford with Judge Thomas H. Somerville, a former President of the Mississippi Bar Association, who had immediately preceeded Judge Farley as Dean of the Ole Miss Law School. After Judge Somerville's retirement from practice in 1929 Bob Farley practiced alone and retired as Mayor to become Oxford's City Attorney from 1926 to 1931. In the meantime, in 1926, he had again affiliated with the Ole Miss Law School, on this occasion as a part-time assistant professor, a position he held until in 1931 when he met The Man Bilbo, and it was decided that Bob Farley, along with the Chancellor and numerous and sundry deans and professors at Ole Miss should, sever his connections. Following this debacle, the Association of American Law Schools and the American Bar Association both somehow reached simultaneous conclusions that this procedure constituted political interference and kicked the Ole Miss Law School out of membership and out of accreditation, which it had so strenuously just won in 1929.

The citizens of Mississippi, at that time became extremely interested

and irate over the loss of accreditation of all its educational institutions. The enrollment in the law school dropped to sixty-nine. First by legislative act and later by Constitutional Amendment, the people of Mississippi abolished all former politically controlled separate Boards of Trustees; and in an attempt to remove education from political interferences forever, set up one Board for all Institutions of Higher Learning and gave complete control and operation of these institutions to such Board. While this was happening Bob Farley was awarded and accepted a Sterling Fellowship at Yale Law School where he won his degree as a Doctor of the Science of Law in 1932.

Under the new system Bob Farley was returned to Ole Miss as Professor of Law in 1932. Enrollment was doubled the first year of his return and accreditation re-won at the next meetings of the Association of American Law Schools and of the American Bar Association. It was Ole Miss' loss and Tulane's gain, even though at a higher cost to Tulane, when Bob Farley served the Tulane Law School as Professor of Law, and for three years as Dean pro tem, during the period from 1935 to 1945.

In February of 1945 Robert Joseph Farley was recalled to Ole Miss to fill his father's former position as Dean of the School of Law. A personal statement of pride will be understood—it was at the writer's suggestion and recommendation that Dean Farley was recalled; a fact, which in its fulfilment the writer feels, constitutes his greatest contribution to the State of Mississippi. In addition to his many duties as Professor and Dean, Bob Farley served as Compliance Commissioner for two important governmental agencies during World War II, and as Hearing Commissioner for the National Production Authority from 1951 to 1953. He was elected by his fellow lawyers as President of the Mississippi Bar Association. He was a member of the American Law Institute and of the American Bar Association where he served as the Uniform Laws Commissioner and was a Director of the Mississippi Economic Council.

A few comparisons will in part indicate his contribution to the Ole Miss Law School. When he became Dean in 1945 there were four full-time law teachers, one part-time teacher, and one librarian. When he retired there were eight full-time teachers, five part-time, and two librarians. There was only one stenographer, now there are four. There were 22,000 books in the library as compared to 40,000 now. Books that were then piled over the floors are now shelved in a commodius library. A new annex has been built which more than doubled the Law Building space; and where two old fans formerly pushed around the hot air, normal to a law school, the entire facility is now air conditioned. Professors' salaries have been trebled and brought somewhat nearer, by comparison, to those of surrounding law schools. In 1945 there could be found, possibly, one student from the Ole Miss Law School who held

a faculty position in a law school other than at Ole Miss; and that one had received most of his training elsewhere. Now, with no research but memory, there can be named a Dean of the graduate school at Yale; a Dean at Vanderbilt; four professors at the University of Florida, one of whom is advisor to the Dean; one professor at the University of Connecticut; one at the University of Arizona; one at Tulane; one at the University of Akron; one at Southern Methodist University; one at Washington and Lee; and one at New York University.

Dean Farley is a man of strong convictions, with courage to express them. He expects the same of others. The Ole Miss slogan of "Quality-Integrity-Progress" could well have been selected with him expressly in mind. His especial emphasis is on integrity, without which he knows there can be no quality nor progress. Silence in the presence of a duty to speak he considers inconsistent with integrity. Where the man, without the added attraction of the office he holds, is the deciding factor, his reputation, logic, personality, and wit have brought to him more invitations to speak before the Bar Associations of other states than all other members of the Bar of Mississippi combined. Surely at a time when such emphasis is being placed on the value of keeping the young people of the state within its borders, we may some day possibly discover the comparative value of maturity, experience, skill, training, and influence of our older citizens.

Congressman J. Randolph Tucker of Virginia, a former President of the American Bar Association, once described the beloved Lucius Quintus Cincinnatus Lamar, another famous Dean of the Ole Miss School of Law. The amazing parallel of his words in their applicability to Robert Joseph Farley is obvious to all who know him. Congressman Tucker said:

> This profound thinker, this Master of abstract thought, was in social life genial and full of humor, loving and making pleasantry with the merriest in the circle. Who can forget his wonderful powers as a racounteur, or his merriment over those of others? Like so many other men of large achievement in the affairs of the world, the capacity which fitted him for these was allied to that which made him the lover of jest, and of playfulness with childhood, when relaxation made it proper and right. He could wield the battle-ax of a Richard, and the scimitar of a Saladin, but could cheer the social circle with his anecdotes, and play games for the delight of infancy.

INTRA-ENTERPRISE CONSPIRACY UNDER SECTION 1 OF THE SHERMAN ACT

*George W. Stengel**

I. Introduction

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[1] Section 2 of the act declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."[2] The first section is commonly called the *conspiracy* section and the second the *monopoly* section. However, under section 2, there may be a conspiracy to monopolize.

Under section 1 two or more persons are necessary for a contract, combination, or conspiracy in restraint of trade. Under section 2 one person—either a natural person or a corporation—can monopolize or attempt to monopolize trade or commerce, and two or more persons may combine or conspire to do so.

Although everyone recognizes that two or more persons are essential for a violation of section 1 of the act, there have been various attempts in recent years to find the requisite plurality of persons within a single corporate enterprise.[3] Thus, cases have been instituted charging

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*Professor of Law, University of Mississippi.

[1]69 Stat. 282 (1955), 15 U.S.C. § 1 (1958).

[2]69 Stat. 282 (1955), 15 U.S.C. § 2 (1958).

[3]For earlier discussions of this subject, see Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 Mont. L. Rev. 158 (1962); Graham, *Antitrust Problems of Corporate Parents, Subsidiaries, Affiliates and Joint Ventures in Foreign Commerce*, 8 ABA Sect. Antitrust L. 32 (1956); Handler, *Contract, Combination or Conspiracy*, 3 ABA Sect. Antitrust L. 38 (1953); Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 Va. L. Rev. 927 (1956); Krause, Multi-Corporate International Business Under Section 1 of the Sherman Act—Intra-Enterprise Conspiracy Revisited, 17 Bus. Law 912 (1962); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183 (1955); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 Ill. L. Rev. 743 (1950); Sprunk, *Intra-Enterprise Conspiracy*, 9 ABA Sect. Antitrust L. 20 (1956); Comment, *Intra-Enterprise Conspiracy under the Sherman Act*, 63 Yale L.J. 372 (1954); Comment, *The Sherman Act and Multi-Corporate Single Traders: Competition Among Affiliates*, 100 U. Pa. L. Rev. 1006 (1952).

(1) a conspiracy between a corporation and its officers or among its officers who were acting on its behalf; (2) a conspiracy between two corporations whose stock was owned by the same natural person or persons; (3) a conspiracy between a parent corporation and its subsidiaries or between two or more subsidiaries; and (4) a conspiracy between a corporation and its unincorporated divisions. Although the problem of finding an intra-enterprise conspiracy in each of the above situations is essentially the same, they will be considered separately.

II. Conspiracy Between a Corporation and Its Officers or Among Its Officers

The Supreme Court has never decided whether there can be a conspiracy, under Section 1 of the Sherman Act, solely between a corporation and its officers, or among its officers. However, several such cases have been decided by the lower federal courts. In the early case of *Patterson v. United States*,[4] the court upheld a conviction of officers and agents of a cash register company which had obtained control of 95 per cent of the market. The corporation was not a party to the action. The defendants were held to have violated both sections 1 and 2 of the act. There appears to have been a clear violation of section 2, since there was an attempt to monopolize, a conspiracy to monopolize and actual monopolization. But the court was not content to rest its decision on section 2. In upholding the conviction under both sections, the court said with respect to section 1:

> The section includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person . . . . Clearly, then, a conspiracy between the officers and agents of one competitor on its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.[5]

Of course, those statements were not necessary to uphold the conviction as there was a clear violation of section 2. Nevertheless, the case appears to be the high water mark in finding a section 1 conspiracy solely between officers and employees of a corporation.

In *White Bear Theatre Corp. v. State Theatre Corp.*,[6] a motion picture exhibitor corporation was held to have conspired with its officers in violation of section 2 of the act. The plaintiff also relied upon section 1, but the court said in the view which it took of the situation it was unnecessary to engage in a separate discussion of that section. Per-

[4] 222 Fed. 599 (6th Cir. 1915).
[5] *Id.* at 618-19.
[6] 129 F.2d 600 (8th Cir. 1942).

haps a conspiracy could have been found between the defendant and film producers. In any event, there was a clear violation of section 2, and the case is no authority for the proposition that there can be a section 1 conspiracy between a corporation and its officers and agents.

All of the later cases have held that there cannot be a section 1 conspiracy between a corporation and its officers or among its officers. In *Nelson Radio & Supply Co. v. Motorola*,[7] the complaint in a treble damage action alleged that a conspiracy in restraint of trade existed between the defendant corporation, its president, sales manager, and other officers, employees, representatives and agents. The court—with Judge Rives dissenting—held the complaint was insufficient to state a cause of action under Section 1 of the Sherman Act. With reference to the alleged conspiracy between the corporation and its agents, the court said:

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . . In the absence of any allegation whatever to indicate that the agents of the corporation were acting in other than their normal capacities, plaintiff has failed to state a cause of action based on conspiracy under Section 1 of the Act.[8]

Similarly, in *Marion County Co-op Ass'n v. Carnation Co.*, it was held that "a violation of Section 1 and the conspiracy portion of Section 2 of the Sherman Antitrust Act cannot be committed by a corporation and its officers and agents when said officers and agents are acting for the corporation in the ordinary scope of their duties."[9]

All of the recent decisions are in accord with the *Nelson Radio* and *Marion County Co-op* cases.[10] The Attorney General's Committee To

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[7]200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953), 53 COLUM. L. REV. 874, 28 N.Y.U.L. REV. 1170.

[8]200 F.2d at 914.

[9]114 F. Supp. 58 (W.D. Ark. 1953), *aff'd* 214 F.2d 557 (8th Cir. 1954).

[10]Tobman v. Cottage Woodcraft Shop, 194 F. Supp. 83 (S.D. Cal. 1961); Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 153 F. Supp. 684 (N.D. Ill. 1957), *rev'd on other grounds*, 257 F.2d 417 (7th Cir. 1958); Hershel California Fruit Products Co. v. Hunt Foods, Inc., 1955 Trade Cas. ¶ 67928 (S.D. Cal. 1954); Whitely v. Foremost Diaries, Inc., 151 F. Supp. 914 (W.D. Ark. 1957); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 1956 Trade Cas. ¶ 68531 (E.D. N.Y. 1956); George W. Warner & Co. v. Black & Decker Mfg. Co., 1958 Trade Cas. ¶ 69214 (E.D. Mich. 1958); Goldlawr v. Shubert, 169 F. Supp. 677 (E.D. Pa. 1958); Sperry Rand Corp. v. Nassau Research and Development Associates, 152 F. Supp. 91 (E.D.N.Y. 1957); Herren Candy Co. v. Curtiss Candy Co., 153 F. Supp. 751 (N.D. Ga. 1957); Hudson Mattress Mfg. Co. v. Harvard Mfg. Co., 1958 Trade Cas. ¶ 68749 (E.D.N.Y. 1957); Brehm Grocer Co. v. Goebel Brewing Co., 1953 Trade Cas. ¶ 67431 (E.D. Mich. 1953).

Study the Antitrust Laws also believed that those decisions were correct. In its report, the Committee said:

> Restraining trade is not illegal, but only contracting, combining, and conspiring in restraint of trade. Since a corporation can only act through its officers, and since the normal commercial conduct of a single trader acting alone may restrain trade, many activities of any business could be interdicted were joint action solely by agents of a single corporation acting on its behalf itself held to constitute a conspiracy in restraint of trade.[11]

If there could be a contract, combination, or conspiracy in restraint of trade solely between a corporation and its officers, or among its officers, a corporation could not function without being in constant violation of the antitrust laws. For example, agreements with respect to price fixing are per se violations of Section 1 of the Sherman Act. Of course, a corporation cannot operate without fixing prices for its products. The only way in which it can fix prices for its products is by agreement among some of its agents. If such agreements were proscribed by the antitrust laws, no incorporated business could operate.

III. Conspiracy Between Corporations Whose Stock Is Owned by the Same Person

In *Windsor Theatre Co. v. Walbrook Amusement Co.*,[12] the court held there could not be a conspiracy between two corporations whose stock was owned by the same person or owned jointly by husband and wife. And in *Goldlawr, Inc. v. Shubert*,[13] the court held there could not be a conspiracy between a corporation and the individual who was its sole shareholder. The court cited *Nelson Radio & Supply Co. v. Motorola*[14] as authority for its decision. It distinguished *Timken Roller Bearing Co. v. United States*,[15] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[16] and *United States v. Yellow Cab Co.*[17] on the ground that "in those three decisions there were separate corporate conspirators. Here there is one acting through its proper agent."

Those are the only cases in which the question has been squarely presented to the court.[18] Although the cases appear to be correctly

[11] U.S. Att'y Gen., Report of the National Committee To Study The Antitrust Laws 31 (1955).

[12] 94 F. Supp. 388 (E.D. Md. 1950).

[13] 276 F.2d 614 (3d Cir. 1960).

[14] 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[15] 341 U.S. 593 (1951).

[16] 340 U.S. 211 (1951).

[17] 332 U.S. 218 (1947).

[18] Syracuse Broadcasting Corp. v. Newhouse, 1955 Trade Cas. ¶ 68127 (N.D.N.Y. 1955), *modified*, 236 F.2d 522 (2d Cir. 1956) may be regarded as contra to the *Windsor* and *Goldlawr* cases. However, in that case there were charges under Section 2 of the Sherman Act and under the Clayton Act as well as under Section 1 of the Sherman Act.

decided, it seems questionable whether they are distinguishable from the *Timken, Kiefer-Stewart,* and *Yellow Cab* cases on the ground that there were separate corporate conspirators in those cases, viz., a corporation and its subsidiaries. In both situations the question is whether a corporation can conspire with its sole shareholder. Should it matter whether that shareholder is a natural person or another corporation? Logically, it seems that there is no distinction, and that no conspiracy should be found in either case.

IV. Conspiracy Between a Parent Corporation and Its Subsidiaries or Between Two or More Subsidiaries

Most of the large corporations, and many small ones, have one or more subsidiaries. This multicorporate form has been employed for various reasons. In many cases it is merely a matter of administrative convenience. Sometimes it is used for minimizing taxes. For example, there may be a saving in franchise taxes by creating local selling companies to operate in various states. It may also be used for spreading risks and limiting tort or contractual liability. If one branch of a corporation's business is exceptionally risky, a subsidiary may be organized to conduct that part of its business. On the other hand, if one part of a corporation's business is of greater interest to investors than other parts, it may be easier to raise capital if a subsidiary is organized. When another business is purchased by a corporation, it may help in preserving the goodwill of the acquired business if it is conducted by a separate subsidiary. When a corporation desires to do business in another state, it may be easier to qualify a subsidiary to conduct that business than to qualify the parent corporation. Or a subsidiary might be organized to do business in another state in order to prevent service of process on the parent company. Quite frequently organization of a subsidiary is the only feasible way in which an American corporation can enter the markets of a foreign country.

Regardless of the reasons for their existence, subsidiary corporations are under the control of their parents. Their officers and directors are chosen by the parent, and quite frequently they are also officers, directors or employees of the parent. The parent corporation may deal with the subsidiary as it pleases, so long as it does not prejudice the rights of creditors or minority shareholders, if any, of the subsidiary. Aside from the latter limitation, it may even dissolve the subsidiary at any time and take over its business.

In spite of the well recognized control that a parent corporation has over its subsidiaries, there is some support for the strange doctrine that there can be a conspiracy between a parent corporation and its subsidiaries, or between its subsidiaries, in violation of Section 1 of the Sherman Act. Fortunately, no court has flatly decided that there can be

such a conspiracy, but there is language in several cases to that effect —so much such language, in fact, that there is danger that it is becoming hornbook law. For example, CCH *Trade Regulation Reporter* states:

> Similarly, it cannot be argued that a conspiracy is impossible merely because two corporations are owned by the same parent, especially when the two are held out as competitors . . . . Generally, therefore, the corporate interrelationship of conspirators is not determinative of the application of the Sherman Act . . . . It is said that defendants who enjoy the benefits of separate corporate entity cannot escape the consequences of unlawful combination by asserting their right to "single trader" status.[19]

The first case to support such a doctrine was *United States v. General Motors Corp.*[20] In that case General Motors Corporation, General Motors Sales Corporation, General Motors Acceptance Corporation, and General Motors Acceptance Corporation of Indiana were convicted of violating Section 1 of the Sherman Act by conspiring against General Motors dealers to force them to finance their purchases from the factory and their sales to consumers through GMAC. GMSC and GMAC were wholly owned subsidiaries of General Motors, and GMAC of Indiana was a wholly owned subsidiary of GMAC. The defendants contended that they were a single enterprise, and that a combination of competing units was essential to a conspiracy under the Sherman Act. In rejecting the single trader argument, the court said:

> This reasoning fails mainly because it assumes that the General Motors dealer is an agent of the manufacturer or, stated differently, because it considers the commerce from factory to retail public as the appellant's commerce rather than the dealers' commerce. Clearly a vertical combination or combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act. . . .
>
> Nor can the appellants enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader. The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce. But even if the single trader doctrine were applicable, it would not help the appellants.[21]

On the facts in the *General Motors* case, it appears that the defendants had violated the antitrust laws in several respects. Probably,

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[19] 1 TRADE REG. REP. ¶ 1435 (1963).

[20] 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), 30 CAL. L. REV. 204 (1942), 10 GEO. WASH. L. REV. 882 (1942), 17 IND. L.J. 255 (1942), 27 MARQ. L. REV. 158 (1943), 21 N.C.L. REV. 1 (1942).

[21] 121 F.2d at 404.

the court could have found a conspiracy between the defendants and General Motors dealers (who were outside the corporate family) in violation of Section 1 of the Sherman Act. There may also have been a violation of section 2 of the act, since it could be found that defendants had attempted to monopolize a portion of interstate commerce. There were clearly tying agreements which violated Section 3 of the Clayton Act.[22] However, the defendants were only charged with violating Section 1 of the Sherman Act. The court seems to have overlooked that fact when it used the language which is quoted above. It expressly relied on *International Business Machines Corp. v. United States*,[23] which involved a violation of Section 3 of the Clayton Act. The court ignored the fact that Section 1 of the Sherman Act does not make mere restraints of trade illegal, but only contracts, combinations, or conspiracies in restraint of trade.

The *Yellow Cab* case[24] has also frequently been cited as authority that there can be a conspiracy between affiliated corporations. In that case the Government brought an action under Sections 1 and 2 of the Sherman Act in which it alleged that the defendants had engaged in a combination and conspiracy to restrain and monopolize interstate trade and commerce in the sale of motor vehicles for use as taxicabs to the principal cab operating companies in Chicago, Pittsburgh, New York, and Minneapolis, and in the business of furnishing cab services for hire in Chicago and vicinity. The complaint further alleged that Morris Markin, who originally controlled a Michigan taxicab manufacturing company, and his associates had acquired control of taxicab operating companies in the four cities and had required them to purchase all of their taxicabs from the manufacturing affiliate. The district court dismissed the case for failure to state a claim upon which relief could be granted.[25] In reversing the judgment of the district court, the Supreme Court said:

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the con-

[22] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).
[23] 298 U.S. 131 (1936).
[24] 332 U.S. 221 (1947), 32 MINN. L. REV. 521 (1948).
[25] 69 F. Supp. 170 (N.D. Ill. 1946).

> spirators, in other words, are not determinative of the applicability of the Sherman Act. The statute is aimed at substance rather than form. . . .
>
> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combinations and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States v. Reading Co.*, 253 U.S. 26, 57, is that "dominating power" over the cab operating companies "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control . . . ."
>
> Moreover, the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete.[26]

It is not clear from the opinion whether the decision was reached under Section 1 or Section 2 of the Sherman Act. However, in *United States v. Columbia Steel Co.*,[27] the Court restricted its holding in the *Yellow Cab* case to the section 2 offense of attempting to monopolize. Mr. Justice Reed said, "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the Act, not that corporate integration violated the Act."[28]

It seems that the decision in the *Yellow Cab* case was not based on intra-enterprise conspiracy, but on the fact that the integrated enterprise was the result of a conspiracy. In other words, there was a violation of Section 2 of the Sherman Act by attempting to monopolize. Of course, corporate affiliation or integration flowing from an illegal conspiracy to monopolize does not insulate the conspirators from antitrust liability.

United States v. New York Great A & P Tea Co.[29] and some of the *Motion Picture* cases[30] have also been cited for the proposition that there can be a conspiracy between affiliated companies. In the *A & P* case, A & P, several of its subsidiary and affiliated companies, certain officers of the A & P chain, and a public relations firm were convicted of a conspiracy to restrain and monopolize trade in violation of Sections

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[26]332 U.S. at 227-29.

[27]334 U.S. 495 (1948).

[28]*Id.* at 522.

[29]173 F.2d 79 (7th Cir. 1949), 44 ILL. L. REV. 252, 58 YALE L.J. 969.

[30]United States v. Griffith, 334 U.S. 100 (1948); Schine Theatres v. United States, 334 U.S. 110 (1948); United States v. Crescent Amusement Co., 323 U.S. 173 (1944).

1 and 2 of the Sherman Act. The court found that A & P had used its tremendous buying power and resources to coerce suppliers. There is no discussion in the opinion of intra-enterprise conspiracy under the Sherman Act. The result in the case could have been reached either under Section 2 of the Sherman Act by finding an attempt to monopolize or under section 1 by finding a conspiracy with persons outside the corporate family. It seems that the case should have been brought under the Robinson-Patman Act.

In the three *Motion Picture* cases the defendants were charged with violating Sections 1 and 2 of the Sherman Act. In each case there was an attempt to monopolize in violation of section 2, and there was a conspiracy with film distributors. The court did not really consider intra-enterprise conspiracy.[31]

Two important cases with respect to intra-enterprise conspiracy were decided by the Supreme Court in 1951. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[32] the plaintiff was a wholesale drug concern which was also engaged in the wholesale liquor business. It brought a treble damage action under Section 1 of the Sherman Act against wholly owned subsidiaries (Seagram and Calvert) of Distiller Corporation Seagram Ltd. of Canada[33] in which it charged that the subsidiaries had agreed or conspired to sell liquor only to those Indiana wholesalers who would resell at prices fixed by defendants. At the trial evidence was introduced which tended to show that the defendants, by concerted action, had refused to sell to plaintiff because it sold the liquor in excess of maximum resale prices which had been fixed by the defendants. The jury returned a verdict for plaintiff, and a judgment for treble damages[34] was entered by the district court. The Court of Appeals for the Seventh Circuit reversed the judgment[35] on ground that an agreement among the defendants to fix maximum resale prices did not violate the Sherman Act because such prices promoted rather than restrained competition. It also held the evidence was insufficient to show that the defendants had acted in concert. On certiorari, the Supreme Court (speaking through Mr. Justice Black) unanimously reversed

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[31]See McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955).

[32]340 U.S. 211 (1951), 37 A.B.A.J. 223 (1951), 50 COLUM. L. REV. 1144 (1950), 12 OHIO ST. L.J. 474 (1951), 24 SO. CAL. L. REV. 507 (1951), 21 TENN. L. REV. 881 (1951).

[33]The parent corporation (Distiller Corporation Seagram Ltd. of Canada) was not a party to the suit. The defendants were Joseph E. Seagram & Sons, Inc. (Seagram, Indiana), which was a wholly owned subsidiary of the parent, two wholly owned subsidiaries of Seagram, Indiana (viz., Seagram Sales and Calvert) and a wholly owned subsidiary of Calvert (Calvert Sales).

[34]The judgment was for $975,000 plus $50,000 for attorney fees.

[35]182 F.2d 228 (7th Cir. 1950).

the judgment of the court of appeals. It held that the court of appeals had erred in holding that an agreement among competitors to fix maximum resale prices did not violate the Sherman Act, and it found that the court of appeals erred in holding that the evidence was insufficient to support a finding by the jury that the defendants had conspired to fix maximum resale prices.

The question of whether wholly owned subsidiaries could conspire with each other had not been decided by the court of appeals, but it was presented by the briefs and oral arguments in the Supreme Court. Since only an issue of law was presented, the Court considered the question and disposed of it in one short paragraph. The Court said:

> Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandising unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. *United States v. Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors.[36]

Prior to this decision, it had been held that fixing minimum resale prices, in the absence of a fair trade law, violated the Sherman Act.[37] The fundamental issue which was decided in the *Kiefer-Stewart* case was that the maintenance of maximum resale prices was likewise a violation of the act. Since there was no difference between the fixing of maximum and minimum resale prices, it did not matter whether there was an agreement between the subsidiaries. There would have been a violation of the Sherman Act if a single corporation had fixed the resale prices.[38]

In *Timken Roller Bearing Co. v. United States*,[39] which was a civil action by the United States to prevent and restrain violations of Sections 1 and 3 of the Sherman Act, the Government charged that Timken Roller Bearing Company had combined and conspired with British Timken and French Timken to restrain interstate and foreign commerce by eliminating competition in the manufacture and sale of antifriction

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[36]340 U.S. at 215.

[37]United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373 (1911). The doctrine was somewhat limited in United States v. Colgate & Co., 250 U.S. 300 (1919); but the Colgate limitation was recently practically eliminated in United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[38]United States v. Parke, Davis & Co., *supra* note 37.

[39]341 U.S. 593 (1951), 37 A.B.A.J. 919 (1951), 25 TEMP. L.Q. 227 (1951), 42 TRADEMARK REP. 3 (1952), 100 U. PA. L. REV. 1006 (1952).

bearings in the markets of the world. The activities of which the Government complained had a long history. As early as 1909 defendant and British Timken's predecessor had made comprehensive agreements providing for division of the world markets for antifriction bearings. The agreements were modified and extended in 1920, 1924, and 1925. In 1927 defendant and Dewar, an English businessman, cooperated in purchasing all of the stock of British Timken. British Timken later sold some of its stock to the public, and, when the suit was filed, defendant owned 30 per cent of British Timken, Dewar owned 24 per cent and 46 per cent was owned by the public. In 1928 defendant and Dewar organized French Timken and divided its stock equally between them. Upon Dewar's death Timken Company had an option to purchase Dewar's stock in both British Timken and French Timken. If the options were exercised, defendant would own 54 per cent of British Timken and 100 per cent of French Timken.[40] The district court found that the contracting parties to the above agreements had allocated trade territories among themselves, fixed prices of products of one sold in territories of the others, cooperated to protect each others markets and to eliminate outside competition, and participated in cartels to restrict imports to, and exports from, the United States. It issued an injunction prohibiting the continuation of the objectionable contracts and ordered defendant to divest itself of its interest in the British and French companies.[41]

On appeal, the Supreme Court modified the decree so as to eliminate the divestiture provisions. In the opinion by Mr. Justice Black, he states that he and Justices Douglas and Minton thought the district court acted properly in ordering divestiture.[42] Mr. Justice Reed, joined by Chief Justice Vinson, wrote an opinion in which they agreed that Timken had violated Sections 1 and 3 of the Sherman Act, but they thought divestiture should not be ordered.[43] Justices Frankfurter and Jackson wrote separate dissenting opinions. Justices Burton and Clark took no part in the decision.

In the majority opinion Mr. Justice Black did not expressly consider whether a parent corporation could conspire with its subsidiaries. However, after stating "prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal . . ."[44] under the Sherman Act, the Court said:

> The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact

[40]Dewar died while the appeal in the case was pending.

[41]341 U.S. 593, 596 (1951).

[42]*Id.* at 600.

[43]*Id.* at 601.

[44]*Id.* at 598.

> of the antitrust laws . . . . Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a "joint venture." Perhaps every agreement and combination to restrain trade could be so labeled.[45]

In his concurring opinion, Mr. Justice Reed said:

> It seems to me there can be no valid objection to that part of the opinion which approves the finding of the District Court that the Timken Roller Bearing Company has violated §§ 1 and 3 of the Sherman Act. It may seem strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even a major interest but any other conclusion would open wide the doors for violation of the Sherman Act at home and in foreign fields.[46]

In his dissenting opinion, Mr. Justice Jackson pointed out that, since many foreign governments prohibit or handicap American corporations from owning plants, entering into contracts or engaging in business directly, organization of foreign subsidiaries is the only practical way for American industries to compete in many foreign markets.[47] Regarding the decision of the majority and the arguments by the Government, Mr. Justice Jackson said:

> It is admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as in the United States, 'that would not be a conspiracy. You must have two entities to have a conspiracy.' Thus, although a single American producer, of course, would not compete with itself, either abroad or at home, and could determine prices and allot territories with the same effect as here, that would not be a violation of the Act, because a corporation cannot conspire with itself. Government counsel answered affirmatively the question of the Chief Justice: 'Your theory is that if you have a separate corporation, that makes the difference?' Thus, the Court applies the well-established conspiracy doctrine that what it would not be illegal for Timken to do alone may be illegal as a conspiracy when done by two legally separate persons. The doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are 'separate persons,' and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy. I think that result places too much weight on labels . . . .
>
> The philosophy of the Government, adopted by the Court, is that Timken's conduct is conspiracy to restrain trade solely because the venture made use of subsidiaries. It is forbidden

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[45] *Ibid.*

[46] *Id.* at 601-02.

[47] *Id.* at 606.

> thus to deal with and utilize subsidiaries to exploit foreign territories, because 'parent and subsidiary corporations must accept the consequences of maintaining separate corporate entities,' and that consequence is conspiracy to restrain trade.[48]

On the facts in the *Timken* case, it is not surprising that the Court found there was a combination which violated the Sherman Act. As early as 1909 there had been agreements between American Timken and the predecessor of British Timken. Those agreements, with modifications, continued until the time of suit. Under the arrangements with Dewar, Timken had combined with its chief competitor in the British and French markets. It could, therefore, be said that Timken had acquired control over the subsidiaries by means of a conspiracy with its competitors. In other words, the multicorporate form was the product of a conspiracy in restraint of trade. That interpretation of the case eliminates or, at least, dilutes it as authority for the intra-enterprise conspiracy doctrine.

In his dissenting opinion, Mr. Justice Jackson ignored the history of the creation of the subsidiaries and overlooked the fact that the subsidiaries were acquired by Timken as the result of a conspiracy in restraint of trade. In assuming that the majority of the Court had adopted the intra-enterprise conspiracy doctrine, he treats the case as though Timken had simply created two wholly owned subsidiaries to conduct its business in the French and British markets and had allocated the respective territories to them. However, as the district court found, the arrangements with Dewar were made to carry on effectively the combination which previously existed to eliminate competition between the parties and to frustrate the competition of outsiders.[49] Regardless of whether Mr. Justice Jackson was correct in assuming that the majority of the Court had adopted the intra-enterprise conspiracy doctrine, his criticism of the doctrine—especially as applied to foreign trade—is certainly sound.

After the *Timken* and *Kiefer-Stewart* cases, the Federal Trade Commission apparently believed that the Supreme Court had completely adopted the intra-enterprise conspiracy doctrine. Consequently, the FTC instituted two cases in which it charged that there was a price fixing conspiracy solely within a corporate family.[50] In *In the Matter of Distillers Corporation-Seagrams, Ltd.*,[51] a parent and several of its wholly owned subsidiaries were charged with unfair methods of competition and

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[48] *Id.* at 606-07.

[49] United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 311 (N.D. Ohio 1949).

[50] In the Matter of Schenley Industries, Inc., 50 F.T.C. 747 (1954); In the Matter of Distillers Corporation—Seagrams, Ltd., 50 F.T.C. 738 (1954).

[51] 50 F.T.C. 738 (1954).

unfair acts and practices in violation of the Federal Trade Commission Act. A consent degree was entered ordering the respondents to "cease and desist from entering into, cooperating in, carrying out or continuing any combination, conspiracy, cooperation or planned common course of action between any two or more"[52] of the respondents to do or perform any of the following acts or things:

> (1) Raise, fix, stabilize or maintain prices;
> (2) Discuss, confer or exchange information for the purpose or with the effect of establishing or maintaining prices, terms or conditions of sale, or of securing adherence to prices, terms or conditions of sale;
> (3) Exchange information with or meet with any retail liquor dealer or with any representative of a retail liquor dealer association, or others for the purpose or with the effect of reaching agreement as to the employment of any resale price maintenance contract or agreement, of adjusting or increasing resale prices after tax rate changes, or of reaching agreement as to the use of any resale price maintenance contract or arrangement as a means of raising, fixing, stabilizing or maintaining prices;
> (4) Use common directors or officers as a means of raising, fixing, stabilizing or maintaining prices;
> (5) Enter into any resale price maintenance contract or arrangement, or police, enforce, or attempt to police or enforce any such contract or arrangement.[53]

An identical consent decree was entered against Schenley Industries and its wholly owned subsidiaries in a similar case.[54]

In each of the above cases there was no charge of conspiracy outside of the corporate family, *i.e.*, other than among the parent and its subsidiaries.

So far, none of the federal courts have applied the intra-enterprise conspiracy doctrine as rigorously as it was applied by the FTC in the *Seagrams* and *Schenley* cases.

Since the *Kiefer-Stewart* and *Timken* cases, there have been a few cases in the lower federal courts involving alleged conspiracies between parents and subsidiaries. In some of those cases, the court simply echoed the broad language of the Supreme Court.[55] However, at least

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[52] *Id.* at 743.

[53] *Id.* at 744.

[54] In the Matter of Schenley Industries, Inc., 50 F.T.C. 747 (1954).

[55] *E.g.*, Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955), a treble damage action. The plaintiff alleged that there was a conspiracy between defendant and its subsidiaries, particularly Tela Railroad Company, which was a Delaware Corporation operating in Honduras. In denying a motion to dismiss, the Court said: "The common ownership of United and Tela does not insulate these corporations from antitrust laws' sanctions." In Streiffer v. Seafarers Sea Chest Corp., 162 F. Supp. 602 (E.D. La. 1958), the court said that "the combinations

two district courts have been reluctant to accept the doctrine that a parent corporation can conspire with its subsidiaries or that the subsidiaries can conspire *inter sese*.[56]

In *Balian Ice Cream Co. v. Arden Farms Co.*,[57] the plaintiff brought actions under the Sherman, Clayton, and Robinson-Patman Acts against fifteen wholly owned subsidiaries of Arden Farms Co. The court rendered judgment for defendants because it found there had been no violation of the antitrust laws. With respect to intra-enterprise conspiracy the court said:

> These actions are unique in that they concern acts not between a group of corporations which are strangers to one another but acts of a parent corporation and its subsidiaries wholly owned and controlled by it. They are maintainable only because the Supreme Court in some very recent cases has held that a corporation dealing with its subsidiaries may be guilty of violations of the antitrust statutes.[58]

In *United States v. Arkansas Fuel Oil Co.*,[59] the court held the fact that a subsidiary corporation had consulted with its parent and obtained its approval prior to announcing a price increase was not sufficient to prove that the subsidiary had engaged in a price fixing conspiracy in violation of the Sherman Act. It thus rejected the position which was taken by the FTC in the *Seagrams* and *Schenley* cases. As to whether there could be a conspiracy between a parent and subsidiary, the court said:

> I recognize that there are broad statements made in decisions called to my attention by the Government which constitute some justification for the position they have taken in this case. But I am not prepared to subscribe to that theory and I don't think there is a controlling decision, and in the circumstances of this case, I think I should go no further than

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prohibited by 15 U.S.C.A. § 1 include a combination between a parent organization and its wholly owned subsidiary . . . ." However, there was also a charge of monopolization under 69 Stat. 282 (1955), 15 U.S.C. § 2 (1958). Although, in Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), the court held a corporation could not conspire with its officers and agents, there is the following dictum in the decision: ". . . of course, a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade but that involves separate entities."

[56]See, *e.g.*, Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd* 231 F.2d 356 (9th Cir. 1952), *cert. denied*, 350 U.S. 991 (1956).

[57]*Ibid.*

[58]*Id.* at 799. The trial court's findings of fact obviated any necessity for the appellate court to consider the question of intra-enterprise conspiracy. The Court of Appeals said: "The trial court found that there was no joint action of Arden and its supposed satellites in depressing prices. Therefore, the action taken was not illegal per se under the Sherman Act or otherwise." 231 F.2d 356, 369 (9th Cir. 1955).

[59]1960 Trade Cas. ¶ 69017 (1960).

> to say that perhaps in my view that the mere approval by a parent corporation of the price schedules and pricing policies inaugurated and fixed by the subsidiary corporation does not constitute per se violation of the Sherman Act.[60]

Quite recently, in *Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.*,[61] the Supreme Court unanimously held that an agricultural cooperative, its subsidiary and an affiliated cooperative could not be considered as independent parties under the conspiracy provisions of Sections 1 and 2 of the Sherman Act. The Court decided that the agricultural cooperative was not liable for conspiracy with a subsidiary cooperative and an affiliated cooperative because of the exemptions granted under Section 6 of the Clayton Act[62] and Section 1 of the Capper-Volstead Act.[63] In reversing the lower courts' judgment for treble damages, the Court (speaking through Mr. Justice Clark) said:

> [W]e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations.[64]

It appears that the Court's reasoning with respect to the exemptions of agricultural cooperatives under the Clayton and Capper-Volstead Acts is equally applicable to a charge of intra-corporate family conspiracy under Section 1 of the Sherman Act. In practical effect and the contemplation of the statute, the members of a corporate family constitute a single business enterprise even though they have formally organized themselves into separate legal entities. To hold otherwise would be to "impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect . . . ."

From the decided cases, it is impossible to discern the position which the courts will ultimately take regarding conspiracy between members of a corporate family under Section 1 of the Sherman Act. There are several possible views: (1) A parent can conspire with its subsidiaries—or the subsidiaries can conspire with each other—to the

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[60] *Ibid.*

[61] 370 U.S. 19, *reversing* 284 F.2d 1 (9th Cir. 1960).

[62] 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958).

[63] 42 Stat. 338 (1922), 7 U.S.C. § 291 (1958).

[64] 370 U.S. at 29.

same extent that unaffiliated corporations can conspire with each other. (2) There can be a conspiracy between affiliated corporations when they hold themselves out as competitors. (3) There can be a conspiracy between affiliated corporations if it results in a restraint of trade of a stranger to the corporate family, but there can be no conspiracy if only trade of members of the corporate family is restrained. (4) There can never be a conspiracy between a parent and its subsidiaries, or between the subsidiaries, in violation of Section 1 of the Sherman Act.

Fortunately, there is no authority to support the extreme position that members of a corporate family can conspire among themselves to the same extent as unaffiliated corporations. Such a rule would make antitrust violators of practically all parent and subsidiary corporations. It would be contrary to our present thinking in both corporation and antitrust law, as it has always been assumed that a parent corporation will control its subsidiaries. Under our corporation codes, control over a wholly owned subsidiary may be as complete as over an unincorporated division or department. The parent not only has a right to control its subsidiaries, but a duty to do so. Consequently, conferences with regard to prices, division of territories, allocation of products, and the like are routine between a parent and its subsidiaries. In most cases the officers and directors of the parent corporation would be remiss in their duties if they neglected such matters. But agreements with respect to prices, division of territory, or allotment of production are per se violations of Section 1 of the Sherman Act when the agreements are between unaffiliated competitors. If the rules as to per se violation were applied to a corporate family, it could not possibly function as an integrated business. Probably, the parent would have to withdraw completely from the management of the subsidiary and transfer its stock in the corporation to independent voting trustees in order to avoid antitrust difficulties. Perhaps not even that would be sufficient—for example, charges might be made under the "conscious parallelism" doctrine.

Under the antitrust laws, as well as under corporation laws, it has always been assumed that a parent will control its subsidiaries. For example, when a corporate family is charged with monopolizing trade or commerce, the business of the subsidiaries is added to that of the parent to determine the corporate family's share of the relevant market. No one would question the propriety of such aggregation, since it is assumed that the subsidiaries are controlled by their parent.

Enough has been said to illustrate that members of a corporate family cannot be treated the same as unaffiliated corporations under Section 1 of the Sherman Act. Perhaps, everyone will agree that, if the intra-corporate family conspiracy doctrine is accepted, some limitations must be imposed. Therefore, let us consider some suggestions for a restricted application of the doctrine.

One suggestion has been that affiliated corporations should be capable of an intra-enterprise conspiracy if they hold themselves out as competitors. There is some support for that view in the cases, *e.g.*, Mr. Justice Black thought the fact that the affiliates held themselves out as competitors was an important factor in the *Kiefer-Stewart* case.[65] It is doubtful, however, whether the subsidiaries were held out as competitors in that case, since their affiliation was well known in the trade. Moreover, it is common practice for a single seller to have several brands of the same product which compete with each other. That situation may occur where the seller is a corporate family, a single corporation, a partnership or an individual proprietorship. In any of these cases, the products may be advertised simply by brand names without disclosing the name of the seller. Such advertising is common practice. Therefore, if it is assumed that failure to disclose a single source of competing products is an evil, application of the intra-enterprise conspiracy doctrine would not eradicate the evil. Nor would the intra-enterprise conspiracy doctrine be of much significance if it were only appled to affiliates which held themselves out as competitors. It would only compel the members of corporate families to disclose their affiliation on their products and in their advertising.

Another view is that there can be a conspiracy between affiliated corporations if it results in a restraint of trade of a stranger to the corporate family, but there cannot be a conspiracy if only trade of the members of the corporate family is restrained. That position was taken by the Attorney General's National Committee to Study the Antitrust Laws. The Report of the Committee states:

> The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated.[66]

Such a distinction would be meaningless because it could always be shown that the trade of outsiders was restrained. Any agreement between members of a corporate family with respect to prices, division of markets, and such, would obviously affect the trade of customers and com-

[65]Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

[66]U.S. ATT'Y GEN., REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 31 (1955).

petitors. Therefore, restricting the intra-enterprise conspiracy doctrine to cases in which there is external restraint would create an illusory limitation.

It might be argued that the intra-enterprise conspiracy doctrine should only be applied where the trade of strangers to the corporate family is *unreasonably* restrained—thus qualifying the doctrine by the rule of reason. Probably that was the intention of the Attorney General's Committee when it said, "[C]oncerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or *unreasonable* restraint on the trade of strangers to those acting in concert is prohibited by Section 1."[67] (Emphasis added.) But agreements to fix prices, control production, or to divide markets or customers, and group boycotts are per se violations of the Sherman Act, *i.e.*, they are "conclusively presumed to be unreasonable and therefore illegal . . . ."[68] Consequently, any agreement between competitors to fix prices is a per se violation of the Sherman Act without regard to the reasonableness of the prices charged. Likewise, any agreement between competitors to control production or divide markets or customers is a per se violation. In such cases the reprehensible conduct is the concert of action—the combination or agreement. Since competitors should not be agreeing, combining, or conspiring with respect to prices and division of markets, the per se rule is fair enough when appled to them. There is no need for their concert of action. On the other hand, where there is a corporate family consisting of a parent and one or more wholly owned subsidiaries, the parent corporation has an obligation to see that the operations of the integrated corporate family are conducted in the best interests of the parent's shareholders.[69] Therefore, the activities of the subsidiaries must be coordinated with those of the parent. In coordinating their business activities, it is common practice for members of a corporate family to have one or more common officers and directors and to hold conferences regarding pricing policies, division of markets, allocation of products, and the like. There must be such concerted action by members of a corporate family. Officers and directors of a parent corporation would breach their duties to their corporation if they dealt with its subsidiaries as though they were competitors.

To conduct properly the aggregate business of a corporate family, it is obviously necessary to restrain the trade of some, or all, of its members. The trade of strangers to the corporate family must also be re-

[67] *Id.* at 35. Some members of the Committee disagreed with that view. They felt that "in no instance can a parent and its subsidiary be held guilty of an offense that must be committed by more than one person."

[68] Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[69] Of course, where the subsidiaries are not wholly owned, the parent must heed the rights of miniority shareholders.

strained to some extent because it is impossible to conduct any business without restraining someone else's trade. Under Section 1 of the Sherman Act *restraint of trade* in itself is not illegal. That statute only prohibits *contracts, combinations, and conspiracies in restraint of trade.* Obviously, some exceptions must be made to the broad language of section 1 of the act. If *all* agreements in restraint of trade were illegal, the members of a partnership could not agree on a price for their product. Therefore, the rule of reason was adopted. Some agreements are unreasonable per se, some are reasonable per se, and others depend on the facts of the particular case. A price fixing agreement between competitors is per se unreasonable. An agreement between the members of a partnership setting a price for its product is per se reasonable. The same is true where the price of a corporation's product is determined by concerted action of its agents. If such price fixing were illegal under the Sherman Act, the corporation could not operate, since it can act only through its agents.

The doctrine of per se legality should also apply to agreements within a corporate family, *i.e.*, between a corporation and its subsidiaries or between the subsidiaries. The spurious distinction that separate entities are involved in the latter situation is without substance. Subsidiaries must be controlled by their parent corporation. It is impossible for a parent corporation to coordinate the activities of the corporate family without engaging in agreements which would be clear violations of Section 1 of the Sherman Act if the corporations were unaffiliated. Therefore, the courts should hold that there cannot be a conspiracy solely between a parent and its subsidiaries or between its subsidiaries. Any other rule will preclude or, at least, nihilistically restrict the use of subsidiaries. Rejecting the intra-enterprise conspiracy doctrine will not prevent the achievement of legitimate antitrust objectives. In nearly all of the cases[70] which have been cited for the intra-enterprise conspiracy doctrine, the same result could have been attained on other, and sounder, grounds.

V. Conspiracy Between a Corporation and Its Unincorporated Divisions

Although, in the *Timken* case, the Government conceded that there could not be a conspiracy between a corporation and its unincorporated divisions,[71] a treble damage action was recently argued before the Supreme Court on that theory in *Poller v. Columbia Broadcasting Sys-*

[70]The only cases in which the same result could not have been reached on other grounds are the consent decrees in In the Matter of Distiller Corporation-Seagrams, Ltd., 50 F.T.C. 738 (1954) and In the Matter of Schenley Industries, Inc., 50 F.T.C. 747 (1954). In those cases it appears that a wrong result was obtained.

[71]Timken Roller Bearing Co. v. United States, 341 U.S. 593, 606 (1951) (Justice Jackson dissenting).

tem, Inc.[72] In that case, the district court granted a summary judgment for defendant, which was affirmed by the court of appeals. Regarding the charge of conspiracy between defendant and its agents and an unincorporated division, the majority of the court of appeals said:

> The purpose of Section 1 (of the Sherman Act) is to prohibit joint action of two or more persons in combining their economic power and restricting competition. Poller's charge that CBS conspired with one of its unincorporated divisions and two of its employees is obviously unsound. It is in reality a charge that CBS conspired with itself. . . .
>
> We conclude that CBS, its unincorporated division, and its employees were incapable of conspiring to restrain trade or commerce.[73]

In his dissenting opinion, Judge Washington said:

> Poller's allegation of conspiracy does not relate to Columbia Broadcasting System (CBS) alone. It includes an unincorporated wholly-owned subsidiary, CBS-TV, two officers of CBS-TV, and other persons. It is clear that corporate officers can be members of a conspiracy with their corporation. The Supreme Court has so held. *Schine Chain Theatres v. United States*, 1948, 334 U.S. 110, 116, 68 S. Ct. 947, 92 L. Ed. 1245; *United States v. Yellow Cab Co.*, 1947, 332 U.S. 212, 227, 67 S. Ct. 1560, 91 L. Ed. 2010. The same cases establish that a Corporation may violate the Sherman Act by conspiring with its wholly owned subsidiaries. . . . In my view, CBS could conspire with CBS-TV, a wholly owned but not incorporated, "division"—as separate and distinct an organization as a wholly-owned subsidiary. Since there were other alleged co-conspirators, it is unnecessary, however, to rely on that ground.[74]

On certiorari, the Supreme Court (by a 5 to 4 decision) reversed the judgment of the court of appeals.[75] It held that a summary judgment should not have been granted because, on the record, it could not be said that no genuine issue as to any material fact existed. Mr. Justice Clark, speaking for the majority, said, "It is argued that CBS cannot conspire with itself. However, this begs the question for the allegation is that independent parties, *i.e.*, Holt and Bartell, conspired with CBS and its officers."[76] In a footnote, Justice Clark said, "We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries."[77]

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[72]368 U.S. 464 (1962), *reversing* 284 F.2d 599 (D.C. Cir. 1960).

[73]Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599, 603 (D.C. Cir. 1960).

[74]*Id.* at 607.

[75]Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962).

[76]*Id.* at 469.

[77]*Id.* at 469 n.4.

It is apparent that nothing of great importance was decided by the Supreme Court in the *Poller* case. It merely held that there was a genuine issue of fact as to whether two of the alleged conspirators were independent parties. Consequently, the case could not be decided by a summary judgment.

In stating that the Court was not passing on the question of whether a corporation could conspire with its unincorporated division, it is unfortunate that Justice Clark implied that there could be such a conspiracy between a parent and its subsidiary.

In his dissent in the court of appeals, Judge Washington was correct in stating that a wholly owned unincorporated division was "as separate and distinct an organization as a wholly owned subsidiary."[78] With regard to control, the situation is indeed the same. But Judge Washington's reasoning should be transposed, *i.e.*, no conspiracy should be found between a corporation and its divisions (or departments) or between a parent and subsidiary. Judge Washington merely carries the absurd doctrine of intra-enterprise conspiracy one step further. If Judge Washington's views were accepted, no business could operate without violating the antitrust laws. Fortunately, no court has accepted them.

VI. Conclusion

Under Section 1 of the Sherman Act, *restraint of trade* alone is not illegal. The section only proscribes *contracts, combinations, or conspiracies* in restraint of trade. Obviously, there must be concerted action by two or more persons to constitute a contract, combination or conspiracy in restraint of trade. On the other hand, section 2 of the act does not require a plurality of persons for its violation. Every person who monopolizes, attempts to monopolize, or combines or conspires with others to monopolize any part of interstate commerce is guilty under section 2. Therefore, a single person can violate that section by monopolizing or attempting to monopolize any part of interstate commerce, and two or more persons can violate the section by combining or conspiring to do so.

In actions under Section 2 of the Sherman Act, the intra-enterprise conspiracy doctrine is not important. A single person (either natural or artificial) may violate that section, and all persons who aid or assist him in his misconduct are guilty as aiders and abettors. Thus, if a corporation violated section 2, its agents, subsidiaries, shareholders, and all other persons who aided and abetted in the violation would also be guilty. All persons who "combined" or "conspired" in the monopolization, or attempted monopolization, would be aiders and abettors. Therefore,

[78]Poller v. Columbia Broadcasting System, Inc., 284 F.2d 599, 607 (D.C. Cir. 1960).

there is no occasion for resorting to the intra-enterprise conspiracy doctrine in actions under Section 2 of the Sherman Act.

In several of the cases which purport to apply the intra-enterprise conspiracy doctrine, the defendants were charged with violating both Section 1 and Section 2 of the Sherman Act. The decisions in some of those cases are confusing because the courts found the defendants guilty of an intra-enterprise conspiracy but failed to state whether the violation was of section 1 or section 2.

So far, the Supreme Court has never decided whether there can be a violation of Section 1 of the Sherman Act by reason of a conspiracy between (1) a corporation and its officers or among its officers and agents, (2) two corporations whose stock is owned by the same person or persons, or (3) a corporation and its unincorporated divisions. However, the lower courts have almost uniformly held that there can be no conspiracy in any of those situations. Those decisions appear to be correct.

There has been considerable controversy as to whether there can be a violation of Section 1 of the Sherman Act by reason of a conspiracy solely between a parent corporation and its subsidiaries or between its subsidiaries. There is language in several decisions—some of them by the Supreme Court—which indicates that there can be a conspiracy in restraint of trade solely between members of a corporate family. However, in all of those cases, the same result could have been reached on other grounds.

It is submitted that the intra-enterprise conspiracy doctrine—which has also been called "corporate self-abuse"[79] and "bath tub conspiracy"[80]—should be rejected in its entirety. Apparently, that has been done with respect to a corporation and its officers and agents. The doctrine should also be rejected with respect to a corporation and its subsidiaries. The members of a corporate family cannot function without engaging in activities which would be clear violations of Section 1 of the Sherman Act if they occurred between non-affiliated corporations. A parent corporation must control and coordinate the activities of its subsidiaries. Finding a violation of Section 1 of the Sherman Act because of a conspiracy solely between a parent and its subsidiaries, or between subsidiaries, is like condemning the bi-sexual oyster for incest. Neither the oyster nor a corporate family should be condemned for something it cannot avoid.

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[79]Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 50 (1949).

[80]Searls, *The Antitrust Laws From the Viewpoint of a Private Practitioner*, INSTITUTE ON ANTITRUST LAWS AND PRICE REGULATION 71, 86 (1950).

WHEN THE INSURED DISAPPEARS

*W. Calvin Wells, Jr.**

I. Introduction

On a hot summer day in 1907 Lex Brame, Jr., kissed his wife and children goodbye and left his home in Jackson, Mississippi, for a two-day business trip to Vicksburg and vicinity. Nothing in Brame's life or circumstances foreshadowed the mystery and tragedy that befell him and his family on that trip. In his mid-thirties, the scion of a distinguished and respected family, a successful lawyer, he enjoyed good health, affectionate family relations, and the warmth of a large circle of friends. The day after he left home he attended business in Valley Park, Mississippi, not far from Vicksburg, and returned that night to his hotel on Vicksburg's historic bluff overlooking the Mississippi River. He dined with a friend, then sent word to his wife that he would return home the following day. Shortly after dinner he had a pleasant conversation with a friend in front of the hotel, after which he walked down the bluff to a point under a bright light near the river where he was last seen reading a book, *The Wandering Jew*. The ensuing litigation for recovery of the insurance on Brame's life involved the seven-year presumption of death, and the reported case[1] has been cited in at least a score of later cases in ten jurisdictions.

It is appropriate to introduce this discussion with a reference to *New York Life Ins. Co. v. Brame*,[2] for it aptly illustrated the human interest appeal usually involved in cases involving the disappearance of the insured. The elements of mystery, suspense, and tragedy attending these cases incite emotions and imagination. Rumors become rife and add to family distress and cause much needless investigation. Court opinions often tantalize the reader with hints of these dramatic aspects. In the *Brame* case, the opinion noted that when last seen under a light near the Mississippi River on Vicksburg's waterfront, Brame was reading a book bearing the intriguing title of *The Wandering Jew*. No doubt the judge threw in this fact more to whet the interest and imagination of the reader rather than as a material fact.

II. Origin and Nature of Presumption of Death

To one interested in insurance law, the title, "When the Insured Disappears," immediately suggests the presumption of death which arises when a person is absent and unheard from for a period of time, usually

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[1]New York Life Ins. Co. v. Brame, 112 Miss. 828, 73 So. 806 (1916).

[2]*Ibid.*

seven years. The presumption of death may rise under the common law,[3] or by statute.[4] The statutes either recognize the common law presumption, or declare it, and no instance has been found of a statute abrogating the common law. In some instances the proof required to raise the presumption may be less than that required under the common law rule, but generally the statutes have had little, if any, effect on the question of proof.[5] All of the statutes except in four states[6] have fixed the period of absence at seven years, in agreement with the common law.

In 1939 the Commissioners On Uniform State Laws developed a model act entitled, *Uniform Absence as Evidence of Death and Absentees' Property Act,* which was subsequently enacted only in the states of Maryland,[7] Tennessee,[8] and Wisconsin.[9]

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[3]The common law rule first found expression in Doe d. George v. Jesson, 6 East 80, 102 Eng. Rep. 1712 (K.B. 1805). The rule developed by analogy to two English Statutes: The 1604 Bigamy Act, 1 Jac. I c.11, exempted from punishment those who remarried when the first spouse had been absent or beyond the seas for seven years, but did not treat the absent party as dead, and did not validate the second marriage; the 1667 statute of 19 Car. II, c. 6, providing that certain persons upon whose lives estates depended could be declared naturally dead. See THAYER, PRELIMINARY TREATISE ON EVIDENCE 319-20 (1898). Wigmore criticized the rule as follows:

> Moreover, the period of seven years is absurdly long. Since that figure was adopted, conditions of social life have radically changed, by the multiplication of rapid and easy means of communication and of investigation; three thousand sheriffs, ten thousand chiefs of police, thousands of local charitable societies, any number of private detective agencies, are available for aid in tracing and locating the absentee if alive.
>
> In short, the seven-years-absence-unheard-from rule is arbitrary, unpractical, anachronistic and obstructive. The circumstances of each case should be the basis for decision, *and there should be no fixed or uniform rule.* 9 WIGMORE, EVIDENCE § 2513*b*, at 472 (3d ed. 1940).

[4]See 9 WIGMORE, EVIDENCE § 2531*a* (3d ed. 1940) [hereinafter cited as WIGMORE]. A number of states have adopted statutes bearing upon or recognizing some aspect of the common law presumption of death. These are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, West Virginia, and Wyoming. Louisiana, a civil law state, which long held to the rule that there was no presumption of death until the lapse of 100 years after death, recently adopted a statute providing for a 30-year period. LA. CIVIL CODE ANN. art. 70-72 (West 1952).

[5]Some courts interpolate into the statutes the common law rules governing the proof of facts necessary to raise the presumption of death; others do not. See Daugherty v. Rouse, 219 S.W.2d 42 (Ky. Ct. App. 1949).

[6]Alaska, 6 years; Arkansas, 5 years; Louisiana, 30 years; Vermont, 5 years.

[7]MD. ANN. CODE art. 16, § 200-12 (1957).

[8]TENN. CODE ANN. § 30-1801 to -1815 (1955).

[9]WIS. STAT. ANN. § 268.22-.34 (1957).

The presumption of death after seven years' absence is a true presumption and should not be confused with other legal conceptions sometimes loosely referred to as presumptions. Presumptions in general have received a great deal of attention from the scholars as well as the courts,[10] and since the presumption of death is typical, what has been said and written about presumptions generally in most instances applies to the presumption of death. The courts have been unable to achieve much semblance of harmony in their reasoning of these cases, but have achieved a rather remarkable harmony as far as results are concerned.

The presumption of the continuation of life ceases upon proof that a person has been absent and unheard from for a period of seven years, and so long as the presumption of death is not rebutted, the presumption of continued life is no longer a factor to be considered when the issue is life or death. In the early development of the rule there was no presumption that the person was dead, but that the presumption of the continuation of life ceased at the end of the seven-year period of absence.[11] According to Thayer, ". . . the judges as well as the text-writers got to expressing what had been put as a cessation of a presumption of life in the form of an affirmative presumption of death . . . ."[12]

III. Proof Necessary to Raise Presumption—To Rebut Presumption

The proof necessary to raise a presumption of death may vary in different jurisdictions. Court opinions often recite facts which are not essential or even material to the issue of life or death, and it is sometimes difficult to ascertain what a particular court considers material facts. In most jurisdictions there must be more than proof of absence and lack of tidings.[13] Proof of the following concurring facts should be sufficient as a general rule: (1) Absence from usual place of residence for prescribed period;[14] (2) identity of the person or persons who would under normal circumstances hear from the missing person;[15] (3) the failure of the person or persons mentioned in No. 2 to have any word

[10]See Thayer, Preliminary Treatise on Evidence 313-52 (1898) [hereinafter cited as Thayer], which is considered the most influential work on the subject of presumptions generally. See the following law review articles and comments for useful studies of presumptions, most of which deal with some aspect of the presumption of death. Laughlin, *In Support of the Thayer Theory of Presumptions*, 53 Mich. L.R. 195 (1953); Laughlin, *Presumptions: A Comment Upon*, 18 Wash. & Lee L. Rev. 57 (1961); Legislation, 38 Colum. L. Rev. 322 (1938); Note, 13 Vand. L. Rev. 1294 (1960); 33 Can. B. Rev. 1192 (1955).

[11]Thayer 313.

[12]*Id.* at 323.

[13]See, *e.g.*, Equitable Life Assur. Soc'y v. Sieg, 53 F.2d 318 (6th Cir. 1931).

[14]Hansen v. Owens, 132 Ga. 648, 64 S.E. 800 (1909).

[15]Modern Woodmen of America v. Gerdon, 72 Kan. 391, 82 Pac. 1100 (1905).

or tidings during the prescribed period;[16] (4) that such diligent inquiry and search has been made as would be reasonable under the circumstances;[17] and (5) that the circumstances were such that absence without tidings can only be accounted for upon the hypothesis that death has intervened.[18]

It has been held that absence without tidings for the statutory period does not raise the presumption of death of an infant who disappeared with mother and stepfather under circumstances indicating that the stepfather was fleeing prosecution and that the infant did not exercise his own volition in disappearing or remaining concealed.[19]

The presumption of death is rebuttable by substantial evidence tending to show that the missing person was alive within the prescribed period.[20] The effect of rebuttal is considered elsewhere herein. Proof sufficient to rebut the presumption could be as varied as the vagaries of human conduct and affairs. The following circumstances have been held sufficient to rebut the presumption: (1) Testimony that the missing person returned;[21] (2) testimony that the missing person was seen alive during the period of alleged absence;[22] (3) testimony that the missing person was heard from during the period by the family or by others;[23] (4) evidence of financial condition, unhappy family relationships, that the absentee was a fugitive from justice or left to avoid prosecution may, in some circumstances, be sufficient to rebut the presumption as a matter of law;[24] and (5) substantial evidence of any nature which tends to prove a motive for disappearance.[25]

Under some statutes the mere absence of a person from the state of his residence for seven successive years raises the presumption that

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[16]*Ibid.*; Arden v. United Artisans, 124 Ore. 225, 264 Pac. 373 (1928).

[17]Modern Woodmen of America v. Michelin, 101 Okla. 217, 225 Pac. 163 (1924).

[18]Arden v. United Artisans, 124 Ore. 225, 264 Pac. 373 (1928).

[19]Manley v. Patterson, 73 Miss. 417, 19 So. 236 (1896).

[20]Johns v. Burns, 67 So. 2d 765 (Fla. 1953); Johnson v. Lee, 212 Miss. 603, 55 So. 2d 140 (1951); Hill v. United Timber & Lumber Co., 221 Miss. 473, 68 So. 2d 420 (1951).

[21]Johnson v. Lee, 212 Miss. 603 55 So. 2d 140 (1951); Anonymous v. Anonymous, 186 Misc. 772, 62 N.Y.S.2d 130 (Sup. Ct. 1946).

[22]National Life & Acc. Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590 (1934); Commonwealth Life Ins. Co. v. Wood, 263 Ky. 361, 92 S.W.2d 351 (1936); Frank v. Frank, 193 Miss. 605, 10 So. 2d 839 (1942); Mutual Life Ins. Co. v. Burgess, 174 S.W.2d 324 (Tex. Civ. App. 1943).

[23]Flynn v. Coffee, 94 Mass. (12 Allen) 133 (1866).

[24]People v. Niccoli, 102 Cal. App. 2d 814, 228 P.2d 827 (1951); McNulty v. General American Life Ins. Co., 153 Pa. Super. 228, 33 A.2d 796 (1943); Thetford v. Modern Woodmen of America, 273 S.W. 666 (Tex. Civ. App. 1925).

[25]Swanson v. United States, 3 F. Supp. 813 (N.D.N.Y. 1933); Wachovia Bank & Trust Co. v. Deal, 227 N.C. 691, 44 S.E.2d 73 (1947); Thetford v. Modern Woodmen of America, 273 S.W. 666 (Tex. Civ. App. 1925).

he is dead.[26] Under such statutes the presumption can be rebutted only by proof that the absentee was alive within the time of absence, and proof that the absentee was a fugitive from justice is insufficient as a matter of law to rebut the presumption.[27] But under the common law and under statutes merely declaring the common law, the cases are uniform in holding that the fact that an absentee is a fugitive from justice is admissible to rebut the presumption of death.[28] Except where the rule is regulated by a statute such as that involved in *Parker v. New York Life Ins. Co.*,[29] the general rule is that evidence of any nature which tends to show a motive for the disappearance is admissible, and, among other circumstances, it may be shown that the domestic relations of the absentee were unhappy.[30]

IV. Effect of Presumption—Rebuttal—Direction of Verdicts

An action on a life insurance policy where the insured has disappeared and has not been heard from in seven years is a typical case for the application of the presumption of death. In such case the operative fact necessary to establish liability under the policy is death of the insured. In short, the issue is life or death. The insured was alive when he disappeared, so there is a presumption that he continues to live, and without any proof on the issue the plaintiff's case fails.[31] But when the plaintiff comes forward with evidence sufficient to raise the presumption of death he has made what is sometimes called a prima facie case.[32] The plaintiff is entitled to a directed verdict unless defendant comes forward with sufficient evidence rebutting the presumption to make a jury issue.[33] Under the so-called "Pennsylvania rule" when the evidence raises the presumption the burden of going forward shifts and the effect of the presumption is not overcome unless the jury finds that the rebutting evidence is true.[34] This is in conflict with the

[26]Parker v. New York Life Ins. Co., 142 Miss. 517, 107 So. 198 (1926); Clement v. Knights of Maccabees, 113 Miss. 392, 74 So. 287 (1917); Brown v. State, 208 Ga. 304, 66 S.E.2d 745 (1951).

[27]Parker v. New York Life Ins. Co., 142 Miss. 517, 107 So. 198 (1926).

[28]See Annot., 44 A.L.R. 1488 (1926).

[29]142 Miss. 517, 107 So. 198 (1926).

[30]See Annot., 64 A.L.R. 1288 (1930).

[31]See, *e.g.*, United States v. Wildcat, 244 U.S. 111 (1917).

[32]See Wigmore § 2494; Laughlin, *In Support of the Thayer Theory of Presumption,* 52 Mich. L. Rev. 195 (1953).

[33]See Wigmore § 2491.

[34]This view was established by *In re* Grenet's Estate, 322 Pa. 111, 2 A.2d 707 (1938); Halzheimer v. Lit Bros., 262 Pa. 150, 105 Atl. 73 (1918). This rule has now been abandoned in Pennsylvania. See MacDonald v. Pennsylvania R.R., 348 Pa. 558, 36 A.2d 492 (1944). See Laughlin, *In Support of the Thayer Theory of Presumption,* 53 Mich. L. Rev. 195 n.61 (1953), where Professor Laughlin lists several noted authorities who support it, notwithstanding the rule that the burden of proof never shifts.

"Thayer view" to the effect that once the defendant (or opponent) has introduced rebutting evidence, the presumption has served its purpose and disappears and the case proceeds as though there was no presumption.[35] This is the majority view and that of Wigmore.[36]

The presumption of death is a rule of substantive law which compels a certain conclusion in the absence of rebutting evidence,[37] and the federal courts will apply the *Erie*[38] rule in diversity cases.[39]

When the plaintiff has offered evidence sufficient to raise the presumption of death, and the opponent has come forward with evidence rebutting the presumption of death, and the case goes to the jury without benefit of presumption, the question arises as to what evidence the plaintiff must produce to persuade the jury of the fact of death and on what theory does he go to the jury. Since the Thayer view has become generally accepted, it has been regarded as improper to instruct the jury concerning the presumption, for indeed the presumption has disappeared from the case. Wigmore says simply that "the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule . . . ."[40] But Wigmore continues and clarifies the effect of the evidence which raised the presumption, when the presumption has been rebutted, as follows:

> It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with *some* evidence to the contrary. For example, if death be the issue, and the fact of absence of seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of producing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighted down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances.[41]

Unless a court follows the Thayer theory it seems necessary to instruct the jury on the presumption because the presumption is regarded as evidence, and the presumption does not disappear until the jury has

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[35]See THAYER 339.

[36]See WIGMORE § 2491; 16 AM. JUR. *Death* § 24 (1938).

[37]See WIGMORE § 2491.

[38]Erie R.R. v. Tompkins, 304 U.S. 64 (1930).

[39]Dick v. New York Life Ins. Co., 359 U.S. 437 (1959). *But see* Daugherty v. Rouse, 219 S.W.2d 42 (Ky. Ct. App. 1949).

[40]WIGMORE § 2491 at 289.

[41]*Id.* at 290.

credited the evidence rebutting the presumption.[42] In *New York Life Ins. Co. v. Gamer*,[43] the question was whether the death of the insured was caused by accident or suicide. The trial court instructed the jury that the defendant (insurer) had the burden of overcoming the presumption of law that death was not voluntary. The Supreme Court of the United States held that the evidence was sufficient to sustain a finding that death was not due to accident, and it was therefore error to apply the presumption and instruct the jury thereon. The court cited a long list of cases as authority for the proposition that "the presumption is not evidence and may not be given weight as evidence."[44] This is the prevailing view, and is consistent with the Thayer view of presumptions and the fundamental proposition that evidence consists of propositions of fact while a presumption is a rule of law which compels a certain conclusion.

It has been asserted with cogent reasoning that presumptions involve permissible inferences, and when, under the prevailing Thayer theory, the presumption is rebutted and disappears from the case, the surviving permissible inferences may be sufficient to be credited by the trier of facts, even though rebutting evidence has been introduced. In short, the trier of facts weights the inferences flowing from the facts which gave rise to the presumption (until rebutted) against the rebutting evidence and credits the evidence it considers the most persuasive. The presumption disappears with the introduction of rebutting evidence, but the jury is at liberty to give such probative force as they think fit to the fact of absence for seven years unheard from. This illustrates the distinction between a presumption and an inference, for a presumption compels a certain conclusion while an inference is permissive.

It remains to be considered when the opponent of the presumption is entitled to a directed verdict. This is largely a question to be determined by the jurisprudence of a particular jurisdiction. In general, when the presumption has been established and the opponent offers rebutting evidence, the presumption disappears, but the permissible inference of death survives and usually is sufficient to make a jury issue.[45] But when the evidence rebutting the presumption is so strong that reasonable minds cannot differ as to the fact of death, then only a question of law is presented and the court will direct a verdict for the opponent.[46] This would obviously follow should the missing person appear in person and establish his identity as the person who disap-

[42]*Cf.* Brunny v. Prudential Ins. Co., 151 Ohio St. 86, 84 N.E.2d 504 (1949).

[43]303 U.S. 161 (1938).

[44]*Id.* at 171.

[45]See AM. JUR. *Death* § 24 (1938).

[46]Brunny v. Prudential Ins. Co., 151 Ohio St. 86, 84 N.E.2d 504 (1949). The reasoning technique in this opinion confuses the surviving inference with the presumption.

peared. The same result should follow when evidence negating death is sufficiently strong. This rule is aptly illustrated by *Brunny v. Prudential Ins. Co.*,[47] where the suit was for the recovery of the proceeds of an insurance policy after the insured had been absent and unheard from, according to the plaintiff's evidence, for seven years. The defendant introduced overwhelming proof that the insured was alive, including insured's deposition in which the insured identified photographs of himself and otherwise established his identity as the missing insured. The Supreme Court of Ohio said that:

> A court should not invade the province of the jury, but in a case like the present one, where upon all the evidence adduced, reasonable minds could not fairly conclude that the presumption should stand, it disappears, and if in addition to such presumption there is no evidence tending to show that the absentee is in fact dead, the duty devolves upon the court to direct a verdict or to render a judgment for defendant on his motion therefor."[48]

V. Time of Death

A question of vital importance in many cases of missing insured persons is the time of death. There is considerable conflict of authority in this country, but generally there are two views. The majority view holds that there is no presumption as to the time of death within the seven-year period, and places the burden of proof on the person seeking to establish death before a certain time.[49] The minority view holds there is a presumption that the absentee died on the last day of the seven-year period.[50] Those courts holding to the minority view reason that since the absentee was alive when he disappeared he must be presumed to have continued to live, and as such presumption ceases to operate only when cut off by the presumption of death, such person cannot be presumed to have died before the expiration of that time; consequently, absent any evidence to the contrary, he will be presumed to have lived during the entire period.[51] Where it is held that there is

[47] *Ibid.*

[48] *Id.* at 94, 84 N.E.2d at 508.

[49] Griffin v. North West Mut. Ins. Co., 250 Mich. 185, 229 N.W. 509 (1930); New York Life Ins. Co. v. Brame, 112 Miss. 828, 73 So. 806 (1916); Hefford v. Metropolitan Life Ins. Co., 173 Ore. 353, 144 P.2d 695 (1944); Ligon v. Metropolitan Life Ins. Co., 219 S.C. 143, 64 S.E.2d 258 (1951); See Wigmore § 2531*a*; 16 Am. Jur. *Death* § 34 (1938); Annot., 26 A.L.R.2d 1064 (1951); Annot., 75 A.L.R. 630 (1931).

[50] See Annot., 75 A.L.R. 630 (1931). This view is subject to criticism because the basis of the presumption of death is that the most reasonable explanation why the absentee has not been heard from in so long a time is that he is dead; but if we assume that he was alive on the last day of the seven-year period it is not at all remarkable that he has not been heard from since then.

[51] Mutual Life Ins. Co. v. Louisville Trust Co., 207 Ky. 654, 269 S.W. 1014 (1925).

a presumption that the absentee died on the last day of the period, it is a rebuttable presumption.[52] The states following the minority view generally hold that only testimony indicating the absentee was exposed to a specific peril may be used to rebut the presumption that he died on the last day of the seven-year period.[53]

Once the proof establishes the seven years have elapsed and the absentee has not been heard from, the fact of death is established. The party having the burden of establishing the time of death must then come forward with sufficient proof to establish either that the insured was alive at a certain time, or dead at a certain time, or before a certain time, depending on the issues. It is very generally held that where a beneficiary in an insurance policy had the burden of proving that the insured, who disappeared, died before the policy lapsed, evidence will be held sufficient to fix the time of death—seven-year absence having established the fact of death—which would not have been sufficient to prove the fact of death.[54] In some cases very slight evidence other than that necessary to establish the presumption of death has been held sufficient to justify an inference of death while the policy was in effect.[55]

In establishing time of death in cases where the seven-year presumption of death arises, the time of death may be shown by proving by direct or circumstantial evidence that at a certain time the absentee was exposed to a specific peril,[56] storm at sea or wreck.[57] But the courts have admitted a wide variety of circumstantial evidence on this issue: the absentee's age,[58] condition of health,[59] domestic and financial circumstances,[60] and conditions and circumstances attending his disappearance.[61]

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[52]Davis v. Metropolitan Life Ins. Co., 285 Ill. App. 398, 2 N.E.2d 141 (1936); Conner v. New York Life Ins. Co., 179 App. Div. 596, 166 N.Y.S. 985 (1917).

[53]Conner v. New York Life Ins. Co., 179 App. Div. 596, 166 N.Y.S. 985 (1917); *In re* Mutual Benefit Co., 174 Pa. 1, 34 Atl. 283 (1896); Price v. Life Ins. Co., 173 S.C. 407, 176 S.E. 312 (1934).

[54]New York Life Ins. Co. v. Brame, 112 Miss. 828, 73 So. 806 (1916); Ligon v. Metropolitan Life Ins. Co., 219 S.C. 143, 64 S.E.2d 258 (1951); 16 AM. JUR. *Death* § 35 (1938); Annot., 61 A.L.R. 1327 (1928); Annot., 34 A.L.R. 1389 (1924).

[55]American Nat'l Ins. Co. v. Hicks, 35 S.W.2d 128 (Comm'n of App. Tex. 1931).

[56]*E.g.*, Brownlee v. Mutual Benefit Health & Acc. Ass'n, 29 F.2d 71 (9th Cir. 1928).

[57]Hancock v. American Life Ins. Co., 62 Mo. 26 (1876).

[58]New York Life Ins. Co. v. Holok, 59 Colo. 416, 151 Pac. 916 (1915).

[59]*In re* Katz's Estate, 137 Misc. 861, 239 N.Y.S. 722 (1930).

[60]Tisdale v. Connecticut Mut. Life Ins. Co., 26 Iowa 170 (1868).

[61]*In re* Estate of Epstein, 19 Conn. Supp. 173, 110 A.2d 639, 642 (Super. Ct. 1954).

VI. Limitation of Action

In cases where the insured was absent and unheard from for seven years and in order to recover on a life insurance policy, the beneficiary offers proof sufficient to establish the time of death at the beginning of the period of absence, the insurer has in a few older cases successfully defended on the ground that the suit was not filed within the limits set by the policy of the statutes of limitation.[62]

The authorities now uniformly hold that where a cause of action upon a life insurance policy is based upon the statutory or common law presumption of death, the cause of action accrues after the expiration of the presumptive period and the suit must be brought within the contractual or statutory time limit after such period has expired.[63]

A few jurisdictions have held valid clauses in policies, usually fraternal societies, providing that evidence of seven years' absence should not give rise to liability.[64] But the majority of courts have held that such provisions are invalid on the grounds either that they are unreasonable,[65] or that they attempt to impose a rule of evidence on the court,[66] or that they are against public policy.[67]

VII. Proof of Loss

Life insurance policies vary considerably in the requirements as to proof of loss. When the insured actually dies and is buried in the normal course of affairs, no problem arises concerning proof of death, but when the insured disappears the problem sometimes arises whether the beneficiary has complied with the policy requirements in this regard. The rule followed by nearly every jurisdiction where the question has arisen is that if the substance and effect of the tendered proof of loss be such that, if presented by legal evidence, it would raise the presumption of death, then the requirements have been satisfied.[68] The Illinois court holds that when the proof in whatever form submitted is sufficient to enable the insurer to form an intelligent estimate of its rights and liability under the contract, then the requirements of the policy are

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[62]See, *e.g.*, Kauz v. The Great Council of the Imperial Order of Red Men, 13 Mo. App. 341 (1883).

[63]See 20A Appleman, Insurance § 11613 at 8 (2d ed. 1963); Annot., 119 A.L.R. 1308 (1939); Annot., 61 A.L.R. 686 (1929); Annot., 34 A.L.R. 91 (1925).

[64]Porter v. Home Friendly Soc'y, 114 Ga. 937, 41 S.E. 45 (1902); Steen v. Modern Woodmen of America, 296 Ill. 104, 129 N.E. 546 (1920).

[65]Cutler v. Modern Samaritans, 195 Minn. 72, 255 N.W. 824 (1934); Fordyee v. Modern Woodmen of America, 129 Wash. 364, 225 Pac. 434 (1924).

[66]*E.g.*, Woodmen of the World v. Piper, 222 S.W. 649 (Tex. Civ. App. 1920).

[67]Fleming v. Merchants' Life Ins. Co., 193 Iowa 1164, 180 N.W. 202 (1920); Modern Woodmen of America v. Michelin, 101 Okla. 217, 225 Pac. 163 (1924).

[68]National Life & Acc. Ins. Co. v. Ruffin, 237 Ala. 401, 187 So. 488 (1939).

satisfied.[69] In applying the general rule of liberal construction of insurance policies to the matter of furnishing proof of death in view of the fact that when a claim is based on the insured's disappearance the beneficiary's means of furnishing proof of death is necessarily limited, the courts have not required strict adherence to the letter of the proof of loss clauses.[70] Substantial compliance under the circumstances sufficient to convince a reasonable person that the claimant has a bona fide cause of action has generally been held to be sufficient. In those cases where it has been held the proof of loss was insufficient, the proof was such that, if presented to a court, it would not have raised the presumption of death.[71]

VIII. Conclusion

In considering the over-all effects of the presumption of death and evidence required to rebut it, it is a debatable question whether the Pennsylvania Rule is preferable to the majority view espoused by Thayer and Wigmore. The problem turns on the function of the presumption. The majority rule has been criticised as "mechanistic"[72] rather than "pragmatic."[73] Other scholars in the field have said that the

> Thayer-Wigmore view has proved unacceptable because it is both arbitrary and unreasonable. Its unreason consists in assigning so slight and evanescent procedural effect to every presumption. Granted that some presumptions, sufficiently impregnated with logic to be held constitutional, may properly be dispelled by what the jury finds to have been perjured rebuttal, this view becomes patently ridiculous when streched to cover the whole presumptive field.[74]

The Thayer-Wigmore view has been accepted by a majority of the courts of this country. Under the opposing Pennsylvania Rule the presumption is treated as evidence. This is contrary to the whole theory of presumptions. It would seem that the majority rule is both practical and logical. Rather than allow the presumption to survive after rebutting evidence comes in, the case should be submitted to the jury on the permissible inference flowing from the facts which gave rise to the presumption. The jury may then decide the case on the evidence, without being confused by the presumption and what probative effect it should have.

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[69]Anderson v. Inter-State Business Men's Acc. Ass'n, 354 Ill. 538, 188 N.E. 844 (1933).

[70]See Annot., 26 A.L.R. 1073 (1923).

[71]National Life & Accident Ins. Co. v. Ruffin, 237 Ala. 401, 187 So. 488 (1939); Benjamin v. District Grand Lodge, 171 Cal. 260, 152 Pac. 731 (1915); Security Bank v. Equitable Life Assur. Soc'y, 112 Va. 462, 71 S.E. 647 (1911).

[72]McCormick, Evidence § 316 at 667 (1954).

[73]*Ibid.*

[74]Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937).

FEDERAL LEASING AUTHORITIES

*Harry D. Owen**

I. Introduction

This article could well be subtitled "Pandora's Box,"[1] because once the lid is lifted on this subject, the organized practitioner is quickly overcome by the evils of bureaucratic confusion and technicalities. The practitioner soon wishes that all of his practice could be limited to private land leases; but, alas, the migratory nature of oil cares not whether the title is good or bad or whether it migrates beneath private or federally controlled lands.

This article will be an attempt to discuss some of the regulations dealing with federal leases that one may encounter in representing the oil operator or in title examinations. The discussion will be limited to the regulations dealing with public domain and acquired land leasing from the Bureau of Land Management.

II. Mineral Leasing Act

The basic law from which all of this stems is the Mineral Leasing Act of 1920.[2] The act and amendments are clearly set out in Gower's *Federal Service, Laws and Regulations Relating to Oil and Gas.*

The Mineral Leasing Act of 1920 established the first method whereby the oil operator could obtain a prospecting permit (and subsequently, a lease) on the public demain. The act was slightly amended several times thereafter, but the major amendment was the Act of August 8, 1946.[3] In this amendment the oil industry was given the opportunity to lease the public domain on a non-competitive basis, with the lease being issued to the first qualified applicant.[4] The sliding-scale royalty based on quantity of production was eliminated and all leases carried a 12½ per cent royalty.[5] The annual rental was established at not less than twenty-five cents per acre per annum,[6] except that the second and

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[1]Having written my introduction prior to reading Ted P. Stockmar's reference to Pandora's Box in his most excellent speech in 8 Rocky Mt. L. Institute 267 (1963), I hesitate to eliminate the same because of its descriptive qualities.

[2]Ch. 85, 41 Stat. 437 (1920), 30 U.S.C. § 181-291 (1958).

[3]Ch. 916, § 1.11, 60 Stat. 950 (1946), as amended, 30 U.S.C. § 181 (1958).

[4]*Ibid.*

[5]Ch. 916, § 3, 60 Stat. 951 (1946), as amended, 30 U.S.C. § 226(b) (Supp. 1962).

[6]Ch. 916, § 3, 60 Stat. 951 (1946), as amended, 30 U.S.C. § 226(d) (Supp. 1962).

third year rental was waived unless the lands were determined to be on a known geologic structure.[7] The leases were issued for a primary term of five years with the option to renew for an additional five years, unless the lands had been withdrawn from leasing in the meantime.[8] The limit of the number of acres one person, corporation or association could hold in any one state was established at 15,360 acres.[9]

From the time of the enactment of the Mineral Leasing Act of 1920 until the Act of August 8, 1946, the federal government had reacquired a vast amount of the land and minerals which had been patented out from the government. This was particularly true during the Roosevelt administrations when the great national forests were established under a reforestration program. For example, in Mississippi alone, there are 1,515,000 acres[10] that are being supervised and controlled by the United States Forest Service in national forests. This does not cover national cemeteries, national monuments, national parkways, wild life refuge lands, game range lands, co-ordination lands, nor lands acquired by and for the use of the War Department.

From this figure, it can be seen that having some knowledge of the laws and regulations pertaining to the leasing of federal lands is more than just academic. More and more of these lands will be involved in drilling deals whereby the oil operator or the investor will necessarily require the service of his attorney to keep him in conformity with the regulations.

The Act of August 8, 1946, was the result of a great effort by the oil industry to liberalize trading and trafficking in federal leases. Only one thing was wrong at the time—Congress forgot to do something about these *acquired lands*. The next year the Act of August 7, 1947[11] was enacted, and the Department of the Interior was given the leasing authority over certain acquired lands. Until that time all leases on acquired lands were competitive leases and issued by the branch of government having jurisdiction thereover.[12] Acquired land leasing was brought under all regulations for leasing of the public domain, except for specific exceptions.[13]

The following acquired lands were expressly excluded from the act: (1) Acquired lands situated within incorporated cities, towns, and

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[7]Ch. 916, § 3, 60 Stat. 951 (1946), as amended, 30 U.S.C. § 226 (Supp. 1962).

[8]Ch. 916, § 3, 60 Stat. 951 (1946), as amended, 30 U.S.C. § 226(e) (Supp. 1962).

[9]Ch. 916, § 6, 60 Stat. 954 (1946), as amended, 30 U.S.C. § 184 (Supp. 1962).

[10]U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT 193 (1962).

[11]61 Stat. 915 (1947), 30 U.S.C. § 353-59 (1958).

[12]See 61 Stat. 915 (1947), 30 U.S.C. § 351 (1958).

[13]43 C.F.R. § 200 (1963).

villages. (2) National parks or national monuments. (3) Lands set apart for military and naval purposes. (4) The tidelands or submerged lands.[14]

The next significant amendment to the Mineral Leasing Act of 1920 was the Act of July 29, 1954.[15] Again the oil industry shows its impact on Congress in that the act put the federal leases on a more nearly equitable basis with private land leases.[16] The act provided that failure to pay rental on or before the anniversary date of the lease would cause termination.[17] Prior to this act, rentals were required to be paid ninety days prior to the anniversary date and upon failure to do so, the lessee was required to post a bond in the amount of $1,000. This meant that the oil operator had to manage the federal lease differently from the private land leases.[18]

The next important amendment was the Act of August 2, 1954.[19] The major point in this amendment was the enlargement of the limitation on the number of acres a person, corporation or association could hold. The holdings were increased to 46,080 acres in leases and 200,000 acres under options, in any one state.[20]

The next amendment was the Act of September 2, 1960.[21] This act made more material changes to the Mineral Leasing Act of 1920 than any other since the Act of August 8, 1946.

Briefly, the changes are as follows:

Competitive leases shall be issued for a primary term of five years and non-competitive leases shall be issued for a primary term of ten years,[22] thus, eliminating the need to apply for the second five-year term in the old leases. The annual rentals were raised to fifty cents for each lease year during the ten-year term.[23] The act increased again the holding limitation so that a person, corporation or association may now hold 246,080 chargeable acres in offers, leases and options in any one state.[24]

One other significant amendment is the provision that any lease, whether issued before or after the Mineral Leasing Act Revision of 1960,[25] on which actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at the

[14]43 C.F.R. § 200.2 (d)-(g) (1963).
[15]Ch. 644, 68 Stat. 585 (1954), as amended, 30 U.S.C. § 226 (Supp. 1962).
[16]See *Ibid.*
[17]Ch. 644, 68 Stat. 585 (1954), as amended, 30 U.S.C. § 226(d) (Supp. 1962).
[18]See *Ibid.*
[19]Ch. 650, 68 Stat. 648 (1954), as amended, 30 U.S.C. § 184 (Supp. 1962).
[20]Ch. 650, 68 Stat. 648 (1954), as amended, 30 U.S.C. § 226 (Supp. 1962).
[21]§ 2, 74 Stat. 781 (1960), 30 U.S.C. § 226 (Supp. 1962).
[22]§ 2, 74 Stat. 781 (1960), 30 U.S.C. § 226(e) (Supp. 1962).
[23]§ 2, 74 Stat. 781 (1960), 30 U.S.C. § 226(d) (Supp. 1962).
[24]§ 3, 74 Stat. 785 (1960), 30 U.S.C. § 184(d)(1) (Supp. 1962).
[25]§ 4, 74 Stat. 781 (1960), 30 U.S.C. § 226-1 (Supp. 1962).

time, shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.[26] This means that if you are actually drilling on the last day of the primary term, your lease would automatically be extended for two years. The solicitor has held that the act does not prohibit additional extensions where actual drilling operations were commenced prior to the end of the "primary term," which had been held in a solicitor's opinion[27] to mean "the entire period in the life of a lease prior to its extension by reason of production."[28] This means simply that one can obtain multiple two-year extensions by drilling on the last day of the lease term.

The most recent amendment as far as is ascertainable is the Act of October 15, 1962.[29] This legislation provided for the reinstatement of oil and gas leases which have terminated automatically by operation of law for failure to pay rentals timely.[30] It provides for the filing of a petition for reinstatement within 180 days after the effective date of the act.[31] When it is shown to the satisfaction of the Secretary of the Interior that the failure to pay timely was justifiable or not due to lack of reasonable diligence, the Secretary may reinstate such lease.[32] This particular act has all the earmarks of class legislation which was enacted for the benefit of some careless, yet politically strong ex-lessee.

III. Acquisition of the Lease

A. Competitive Leasing

Those lands which are on a known geologic structure of a producing oil and gas field will be leased only on a competitive basis. The designation of a known geologic structure (or to use the language of the Bureau —K.G.S.) is made by the United States Geological Survey.[33] The determination of these known structures is highly significant to the holder of federal leases, for they affect not only requirements for drilling, but also the maintenance requirements of the lease, the rental that might be due, and the bond that might be required. The lands and deposits subject to disposition under the act which are within the known geologic structure are divided into leasing blocks or tracts of not exceeding 640 acres each.[34] Of course, in this day and time, and particularly in Missis-

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[26] 43 C.F.R. § 192.120a (1963).
[27] 67 Interior Dec. 357 (1961).
[28] *Ibid.*; see 43 C.F.R. § 192.120a (1963).
[29] 76 Stat. 943 (1962), 30 U.S.C. § 188 (Supp. 1962).
[30] 76 Stat. 943 (1962), 30 U.S.C. § 188(c) (Supp. 1962).
[31] 76 Stat. 943 (1962), 30 U.S.C. § 188(c)(1) (Supp. 1962).
[32] 76 Stat. 943 (1962), 30 U.S.C. § 188(d) (Supp. 1962).
[33] 43 C.F.R. § 192.6 (1963).
[34] 43 C.F.R. § 192.50 (1963).

sippi, one would find only isolated forties or eighties on known structures which would comprise a competitive bidding unit unto itself. These lands are offered for lease at a royalty and rental specified in the notice of sale to the qualified person who offers the highest bonus by competitive bidding. Notice of the offer of lands for lease is published once a week for five consecutive weeks in a newspaper of general circulation in the county in which the lands are situated.[35]

The bidder must submit with his bid (1) a certified check, money order or cash equal to ⅕th of the amount bid by him; and (2) a statement over the bidder's signature with respect to citizenship and interest held similar to that required of an offeror for a non-competitive lease, and if the bidder is a corporation, it must file a statement similar to that required for a corporate offeror on a non-competitive lease.[36]

B. Non-competitive Leasing

1. *In General*

The regulations applicable to non-competitive leases apply to the public domain and acquired lands, except for specific exceptions,[37] which will be discussed in conjunction with the regulations.

Leases which have been cancelled or relinquished, or have been terminated by operation of law for non-payment of rentals, or have expired by operation of law at the end of their primary or extended term, and which are not on a known geologic structure, are subject to the filing of new lease offers *only* after notation on the official record of the cancellation, relinquishment, or termination and only in accordance with the provisions of Section 192.43, Title 43, Code of Federal Regulations.

In short, this means if there has never been a lease of record on a tract of public domain or acquired lands, the first qualified applicant for the lease will be issued a non-competitive lease, but if the lands have been leased previously, then upon cancellation or termination of the prior lease, a public drawing must be held.[38]

On the third Monday of each month, or the first working day thereafter if the land office is not officially opened for business on the third Monday, the Bureau of Land Managment posts on the bulletin board in each land office a list giving the description of lands and also leases which expired, were terminated, or were cancelled or relinquished in whole or in part. These lands and leases become subject to leasing at 10:00 A.M. on the fifth working day following the posting of the notice. Posted with the list of lands available for leasing is also a notice stating

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[35] 43 C.F.R. § 192.51 (1963).

[36] 43 C.F.R. § 192.50 (1963).

[37] 43 C.F.R. § 200.4 (1963).

[38] 43 C.F.R. § 192.43(b) (1963).

that the lands are subject to simultaneous filing of offers from the time of posting until 10:00 A.M. on the fifth working day thereafter.[39]

Each offer to lease must conform with the acreage required, that is, there must be a minimum of 640 acres in each offer unless it is shown that the land is surrounded by lands not available for leasing and must be accompanied by separate remittances to cover payment of the filing fee and the payment of the advanced rental required by the regulation. The remittance covering the payment of the advanced rental must be by cash, money order, certified check, or cashier's check, while the filing fee may be paid by a similar remittance or by an uncertified check.[40] It was mentioned previously that there are some differences regarding acquired lands and public domain. The provision of section 192.42(d) requiring the inclusion of not less than 640 acres in each offer is not applicable to acquired lands.[41]

If more than one offer to lease all or any part of the acreage covered by an expired, cancelled, relinquished or terminated lease is filed during the period provided, the priorities will be determined by a public drawing. This has been referred to by the operators as "the government lottery."[42] In short, one must be lucky enough to have his name drawn out of a hat to get one of these leases.

The industry has been very interested in *Thor-Westcliffe Development, Inc. v. Udall.*[43] The company attacked the validity of Section 192.43, Code of Federal Regulation, asserting that the Mineral Leasing Act of 1920 provided that the first qualified applicant was entitled to a priority, and that the Secretary exceeded his authority by adopting the foregoing regulation.[44] Unfortunately, the court of appeals affirmed the decision of the district court granting summary judgment in favor of the Secretary. It now appears that we will continue to "play the lottery" for federal leases.

2. *The Offer For a Non-Competitive Lease*

For a non-competitive lease on the public domain, five copies of Form No. 4-1158, or a valid reproduction thereof, must be filed in the appropriate land office.[45] In states for which there are no land offices, these forms must be filed with the Director of the Bureau of Land Management, in Washington, D.C.[46] Now, for acquired lands, seven copies

[39] *Ibid.*

[40] 43 C.F.R. § 192.43(c) (1963).

[41] 43 C.F.R. § 200.8 (1963).

[42] Stockmar, *Problems Related to the Filing and Acquisition of Federal Oil and Gas Leases*, 8 ROCKY MT. L. INSTITUTE 267, 275 (1963).

[43] 314 F.2d 257 (D.C. Cir. 1963).

[44] *Id.* at 258.

[45] 43 C.F.R. § 192.42(b) (1963).

[46] *Ibid.*

of Form No. 4-1196, or a valid reproduction thereof must be filed in the appropriate land office.[47] Each offer shall be accompanied by (1) a filing fee of $10.00, which is retained as a service charge;[48] (2) a full payment of the first year's rental on the total acreage;[49] (3) a statement over the offeror's signature stating his direct and indirect interest in oil and gas leases, applications or offers therefor, and options exceeding 246,080 acres in the same State of which no more than 200,000 acres are under option;[50] a signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued, or setting forth the names of the other interested parties. If there are other parties interested in the offer, a separate statement must be signed by each of them, and by the offeror setting forth the nature and extent of interest of each, the nature of the agreement between them, if oral, and a copy of such agreement if written.[51]

If the offer is signed by an agent, or if any agent has been authorized to act on behalf of the offeror or with respect to any offer of lease, there must be included a separate statement over the signature of the agent and the offeror stating whether there is any agreement or understanding between them, either verbal or written, by which the attorney-in-fact has received or is to receive any interest in the lease.[52]

If the offer is made by a guardian or trustee, a certified copy of the court order authorizing him to act as such and to fulfill in behalf of the minor or minors all obligations of the lease arising thereunder must be filed. Such guardian or trustee must make a statement as to the citizenship and the holdings of each minor and a similar statement as to his own citizenship and holdings under the leasing act.[53]

If the offer is made by an association including a partnership, it must be accompanied by a certified copy of the articles of the association and the same showing as to the citizenship and holdings of its members as required of an individual.[54]

If the offer is made by a corporation, the offer must be accompanied by a statement showing (1) the state of incorporation, (2) that it is authorized to hold oil and gas leases and that the officer executing the lease is authorized to act on behalf of the corporation in such matters, (3) the percentage of stock, both voting and non-voting, owned by aliens and persons having addresses outside the United States, and (4) the names and addresses of any stockholder holding 20 per cent or more

[47] 43 C.F.R. § 200.8(b) (1963).
[48] 43 C.F.R. § 192.42(e)(1) (1963).
[49] 43 C.F.R. § 192.42(e)(2) (1963).
[50] 43 C.F.R. § 192.42(e)(3)(ii) (1963).
[51] 43 C.F.R. § 192.42(e)(3)(iii) (1963).
[52] 43 C.F.R. § 192.42(e)(4)(i) (1963).
[53] 43 C.F.R. § 192.42(e)(5) (1963).
[54] 43 C.F.R. § 192.42(e)(6) (1963).

of the stock of the corporation. If 10 per cent of the stock is owned by aliens, the Bureau may require additional information before issuing the lease. A separate showing of the citizenship and holdings of stockholders owning or controlling 20 per cent or more of the stock of any class must also be furnished. Where this information has previously been filed, a reference by serial number to the record where so filed will be sufficient in this matter.[55]

An application will be rejected if the total acres exceeds 2,560 acres in any one application.[56] These requirements are the same that must be included in Application for Approval of Assignment.

An interesting feature of the regulation is the reference accorded certain patentees of public domain lands.[57] A patentee who made entry prior to February 25, 1920, or an assignee or vendee of such a patentee, if the assignment or conveyance was made prior to January 1, 1918, is entitled to a preference right to a lease for the land, if the patent was impressed with the reservation of oil and gas.[58]

IV. Maintenance of the Lease

A. Rentals

On non-competitive leases issued prior to September 2, 1960, a rental is payable as specified in the respective leases.[59]

On all non-competitive leases issued on or after September 2, 1960 the rental is payable at fifty cents per acre, or portion thereof, for each annual rental.[60] The rental may be increased by the Secretary of the Interior, but it must not be less than fifty cents an acre under the new act.[61]

On leases wholly or partly within the known geologic structure of a producing oil or gas field the Regulations provide: (1) If they are issued non-competitively and not committed to a unit plan which includes a well capable of producing oil or gas and containing a general provision for allocation of production, beginning with the first lease-year after the expiration of thirty days notice that all or part is included in a known geologic structure and for each year thereafter prior to discovery, rental of $2.00 per acre or fraction thereof[62] is payable. (2) If they are issued non-competitively and committed to a unit plan which includes a well capable of producing oil or gas and contains a general

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[55] 43 C.F.R. § 192.42(f) (1963).
[56] 43 C.F.R. § 192.42(g)(1)(ii) (1963).
[57] 43 C.F.R. § 192.70 (1963).
[58] 43 C.F.R. § 192.70(a) (1963).
[59] 43 C.F.R. § 192.82(a)(2) (1963).
[60] 43 C.F.R. § 192.82(a) (1963).
[61] 74 Stat. 785 (1960), 30 U.S.C. § 226 (Supp. 1962).
[62] 43 C.F.R. § 192.80(b)(1) (1963).

provision for allocating production, the rentals prescribed for the particular lease apply to the acreage not within the participating area.[63] (3) If issued competitively, an annual rental, prior to a discovery on the leased lands, of $2.00 per acre or fraction thereof is payable, unless a different rate of rental is prescribed in the lease.[64] On leases issued in any other way, an annual rental of $1.00 per acre or fraction thereof is payable.[65]

B. Minimum Royalty

On leases issued on or after August 8, 1946, a minimum royalty of $1.00 per acre in lieu of rental is payable at the expiration of each year after a discovery has been made, commencing with the lease year, beginning on or after the date of discovery, on unitized leases, however, the minimum royalty is payable only on the participating acreage.[66]

C. Royalty on Production

There is a royalty of 12½ per cent on non-competitive leases issued under section 17 of the act.[67] On competitive leases, the rates are set forth in the notice.[68]

There are various other schedules of royalty in the regulations dealing with leases issued prior to August 8, 1946.[69] Such leases are very rare in Mississippi, if they exist at all.

D. Limitation of Overriding Royalty

An agreement creating an overriding royalty or payment out of production, when added to overriding royalty previously created and to royalty payable to the United States, aggregate in excess of 17½ per cent is deemed a violation of the terms of the lease unless such agreement expressly provides that the obligation to pay such overriding royalty is to be suspended when the average production of oil per well per day is fifteen barrels or less.[70] This provision is often misunderstood by the operators. There is no limit to the amount of overriding royalty or production payment that may be traded on: one can have as great an override as he is able to trade, provided, the foregoing provision is incorporated in the agreement. It should be noted that this provision no

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[63] 43 C.F.R. § 192.80(b)(2) (1963).

[64] 43 C.F.R. § 192.80(b)(3) (1963).

[65] 43 C.F.R. § 192.80(c) (1963).

[66] 43 C.F.R. § 192.81 (1963).

[67] 43 C.F.R. § 192.82(a)(1) (1963).

[68] 43 C.F.R. § 192.82 (a) (2) (1963).

[69] See 43 C.F.R. § 192.82 (1963).

[70] 43 C.F.R. § 192.83 (1963).

longer applies to gas. The earlier regulation included 500,000 MCF of gas per day, but this has been removed by amendment of the regulations.[71]

E. Bonds

Bonds may be corporate, surety, or personal.[72] Personal bonds, however, must be accompanied by a deposit of negotiable federal securities equal at par value to the amount of the bond.[73] Bond forms are provided by the Bureau of Land Management.

Prior to the issuance of a competitive lease, a successful bidder must furnish a corporate surety bond of double the amount of $2.00 per acre rental at least, but not less than $1,000.00, nor more than $10,000.00. Such a bond must also be filed whenever all or any part of a lease issued non-competitively is determined to be within the limit of a known geologic structure.[74] When a bond is required by law for the protection of the owners of surface rights, a non-competitive lessee must file $1,000.00 bond, or a general lease bond.[75]

Before conducting drilling operations, a lessee must furnish $10,000.00 general lease bond. Where an operating agreement has been approved by the Bureau, an operator may file an operator's bond. This does not mean nor refer to a designation of operator form.[76]

The regulations further provide for a nation-wide bond of $150,000.00 and a state-wide bond of $25,000.00, in lieu of separate lease bonds.[77]

F. Continuation or Extension of Leases

1. *Single Five-year Extension*

Unless otherwise provided by law, all non-competitive leases issued prior to September 2, 1960, are entitled to a single five-year extension[78] upon application filed within ninety days prior to the expiration date.[79] However, if the lands have been withdrawn from leasing, the extension will be disallowed.[80] A withdrawal, however, does not affect the right to an extension if actual drilling operations had been commenced previously and were being prosecuted on the expiration date.[81] Moreover, if

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[71] *Ibid.*
[72] 43 C.F.R. § 192.100(c) (1963).
[73] *Ibid.*
[74] 43 C.F.R. § 192.100(a) (1963).
[75] 43 C.F.R. § 192.100(b) (1963).
[76] 43 C.F.R. § 192.100(c) (1963).
[77] 43 C.F.R. § 192.100(e) (1963).
[78] 43 C.F.R. § 192.120(a) (1963).
[79] 43 C.F.R. § 192.120(b) (1963).
[80] 43 C.F.R. § 192.120(d) (1963).
[81] *Ibid.*

the notice of withdrawal is not sent to the lessee by registered mail, ninety days prior to the expiration date, the lessee's rights are not affected.[82]

2. *Two-year Extensions*

If it is determined that a non-competitive lease issued prior to September 2, 1960, is within the limits of a known geologic structure on the expiration date of the initial five-year term, the lessee is entitled to an extension of the lease for two years and so long thereafter as oil or gas is produced in paying quantities. If a lease is partially outside the limits of a known geologic structure and partially within, the part outside is entitled to a five-year extension while the part within only to a two-year extension.[83]

Since the passage of the Act of September 2, 1960, all leases, regardless of when issued, may be extended for two years and so long thereafter as oil or gas is being produced in paying quantities, if, at the end of the primary term, actual drilling operations are being conducted on the land, or on lands within an approved cooperative or unit plan in which the lease is included.[84]

3. *Lesses Eliminated From Unit Plan*

Any lease eliminated from an approved cooperative or unit plan or from any communitization or drilling agreement will continue in effect for the original term of the lease or for two years after its elimination from the plan or agreement, whichever is the longer, and so long thereafter as oil or gas is produced in paying quantities.[85]

4. *Leases Committed to a Unit Plan*

Any lease committed to a unit plan, for example, field-wide units, that covers lands lying outside the unit will be segregated into separate leases. The non-unitized portion will continue in effect for the term of the lease from which it was segregated, but not for less than two years from the date of such segregation, and so long thereafter as oil or gas is produced in paying quantities.[86] In the Bureau of Land Management Decision 1961-24[87] "term of the lease" has been interpreted to mean the term at the time of the segregation from the portion of the lease committed to the unit. Therefore, if at the time of segregation, the portion

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[82] *Ibid.*

[83] 43 C.F.R. § 192.120(e) (1963).

[84] 43 C.F.R. § 192.120a (1963).

[85] 43 C.F.R. § 192.123 (1963).

[86] 43 C.F.R. § 192.122(c) (1963).

[87] Husky Oil Co., Gower Fed. Serv. BLM-1961-24 (1961).

committed was then in an indefinite term, such as "so long thereafter as oil or gas is produced in paying quantities,"[88] the non-unitized or segregated portion would continue for the same indefinite term as the parent lease.

5. *Partial Assignment of Lease*

Assignment of the full interest in a portion of a lease segregates the assigned and the retained portion thereof.[89] The segregated portion will continue in effect for the primary term of the original lease, but not for less than two years after discovery of oil or gas in paying quantities on any other segregated portion of the original acreage.[90] Both the assigned and retained portion of leases issued prior to September 2, 1960, will be extended for two years by a partial assignment during the extended term of the original lease where the original lease is in its extended term or under any provision of the act.[91] For leases issued after September 2, 1960, such an extension is available only where the original lease is held beyond its primary term by production or by the payment of compensatory royalty.[92]

Assignments become effective on the first day of the month following the filing of the assignment.[93] Thus assignments of portions of such leases in their extended terms must be filed when there is at least one full month remaining in the life of the lease, otherwise, the lease would expire before the assignment becomes effective.[94]

The practitioner is cautioned that the assignment referred to in this section must be an assignment of the full interest in a portion of the lease. Assignments of a fractional undivided interest in the entire lease or a portion of the lease do not operate to extend the lease.

6. *Miscellaneous*

Payment of compensatory royalty during the term of the lease extends the lease for the period of the payment and for a period of one year from the discontinuance of such payment, and for so long thereafter as oil or gas is produced in paying quantities.[95]

A lease which is in its extended term because of production shall not terminate upon cessation of production if, within sixty days there-

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[88] *Ibid.*

[89] 43 C.F.R. § 192.143 (1963).

[90] 43 C.F.R. § 192.144(a) (1963).

[91] 43 C.F.R. § 192.144(b) (1963).

[92] 43 C.F.R. § 192.144(c) (1963).

[93] Franco-Western Oil Co., 65 Interior Dec. 316 (1958).

[94] *Ibid.*

[95] 43 C.F.R. § 192.8(b) (1963).

after, reworking or drilling operations on the leasehold are commenced and are conducted with reasonable diligence during the period of non-production.[96]

The Secretary of the Interior has authority to suspend operations or production under a lease, and if he does so, the lease will be extended for the period of suspension.[97]

If there is a well on a lease capable of production but which is not being produced, the lease will not expire until after written notice has been given the lessee allowing him a reasonable time, not less than sixty days, within which to place the well on a producing status.[98] This has been held to apply only if a well on the lease is capable of production in paying quantities.[99]

G. Assignments or Transfers

A divided or undivided interest in either all or part of the leased acreage may be assigned.[100] Assignments may be made on Bureau Form No. 4-1175, when transferring record title to all or part of an oil and gas lease.[101] However, an ordinary typewritten assignment may be submitted.

Assignments must be filed in triplicate, within ninety days after final execution.[102] This has been interpreted to mean ninety days from the last acknowledgment. Any assignment must be accompanied by an application for approval of any transfer and a $10.00 filing fee for each separate assignment.[103] A separate assignment for each lease must be made.

A single copy of the application is sufficient. A single executed copy of all other instruments of transfer, or of an operating agreement, will also be sufficient.[104] No copies will be returned unless more than one is filed.[105]

An assignment of a definitely described portion of the lands in a lease segregates the assigned and the retained portions into separate and distinct leases.[106] An assignment of an undivided interest does not segregate the lease.[107]

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[96] 43 C.F.R. § 192.121(a) (1963).
[97] 43 C.F.R. § 191.26(a)-(b) (1963).
[98] 43 C.F.R. § 191.121(b) (1963).
[99] Steelco Drilling Co., 64 Interior Dec. 214 (1957).
[100] 43 C.F.R. § 192.140 (1963).
[101] 43 C.F.R. § 192.141(a) (2) (1963).
[102] *Ibid.*
[103] 43 C.F.R. § 192.141(a)(3) (1963).
[104] See *Ibid.*
[105] 43 C.F.R. § 192.142 (1963).
[106] 43 C.F.R. § 192.143 (1963).
[107] See 43 C.F.R. § 192.142 (1963).

An assignment of a separate zone or deposit or of a part of a legal subdivision will not be approved unless the necessity therefor is established by clear evidence.[108] Thus, if an individual desires to contribute to a drilling arrangement only those rights earned by drilling, or, as is common in the industry, assign all rights down to 100 feet below the depth actually drilled, he must be advised that this can be accomplished only by an operating agreement and not by outright assignment. Under this procedure he will remain the lessee of record and will retain the lease and operating rights in the "deep rights," while assigning away by operating agreement the operating rights from the surface to the depth drilled. This reference to "operating agreement" must not be confused with what is commonly understood as an operating agreement covering the operation of lands for development.

V. Drilling and Producing

All operations covering drilling and producing are under the supervision of the Geological Survey.[109]

Prior to conducting drilling operations, the lessee must file with the Bureau of Land Management an oil and gas lessee's bond in the amount of $10,000.00.[110] In many instances, the lessee himself will not conduct the drilling operations, but will farmout the lease, in which case someone other than the lessee will conduct the operations thereon. In that event, the lessee must execute in triplicate a designation of operator form, which constitutes and designates the operator as agent for the lessee.[111]

The operator then must obtain approval of the drilling location from the agency having jurisdiction over the lands.[112] For example, where the lands constitute a part of a national forest, the forest ranger will have the authority to assess the damages to the location, receipt for payment, and subsequently file approval of the location with the Geological Survey.

The operator must prepare and file in triplicate a notice of intention to drill[113] and obtain a written permit to drill[114] before spuding the well. Of course, this drilling permit is in addition to the permit issued by the state Oil and Gas Board. The notice of intention to drill must

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[108] 43 C.F.R. § 192.140 (1963).

[109] 30 C.F.R. § 221.1 (1959).

[110] 43 C.F.R. § 192.100(c) (1963).

[111] 30 C.F.R. § 221.19(a) (1959).

[112] 30 C.F.R. § 221.20(a) (1959).

[113] 30 C.F.R. § 221.58(a) (1959).

[114] *Ibid.*

be accompanied by the designation of operator form in triplicate;[115] where a bond is being filed on a particular lease for the first time, the bond may be filed along with the other papers for examination by the Geological Survey, which in turn will file the same with the Bureau.

Much of the record filing incident to the drilling operations is purely geological and engineering reporting, but because the procedures are strange to most of the operators, the lawyer finds that he is called upon to give comfort to the operator or his engineering staff on each form required to be filed. These forms include a weekly progress report, a notice of intention to abandon, or notice of intention to run pipe and complete, a history and log of the well, and others for similar information.[116]

The federal leases contain no pooling provision so, in the event of pooling a federal lease with private land, a communitization agreement must be prepared and filed with the Geological Survey for approval.[117] The communitization agreement sets out the unit to be developed and the zone or horizon to be unitized. All leases unitized are described and the unit participation figures determined for each tract so that the government may give its consent to a unit royalty rather than an individual lease royalty.[118] This, in itself, is not particularly complicated, but merely requires a great deal of paper work. The real catch to the matter is that unless one has an order of the Oil and Gas Board forcing integration of all separately-owned interests within the unit, the communitization agreement must include the signature of every working interest owner, every overriding owner, and every royalty owner within the unit.[119]

Under a forced pooling order from the state Oil and Gas Board, only the lessee of the federal lease and the operator are required to sign the said agreement. The communitization agreement must be filed in quadruplicate for public domain lands, and in quintuplicate for acquired lands.

The operator must be very careful about monies paid into the Geological Survey because monies so paid will not be refunded. For example, if an over-payment of royalty or compensatory royalty is made, the only remedy is an adjustment out of future production.

Once a lease has been drilled and a dry hole abandoned, if the location has been restored to the satisfaction of the agency having jurisdiction over the lands, a lessee may request cancellation of lessee's bonds, and generally such cancellation will be authorized.

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[115] 30 C.F.R. § 221.19(a) (1959).
[116] 30 C.F.R. § 221.58-.66 (1959).
[117] See 30 C.F.R. § 226 (1959).
[118] 30 C.F.R. § 226.12 (1959).
[119] 30 C.F.R. § 226.8 (1959).

VI. Conclusion

Do not be reticent about practicing under the regulations when it is discovered that there are some instruments for which there is no special form. Now and then documents will be returned for additions or corrections, but on the whole, almost any form of instrument will be accepted, provided they comply with certain primary regulations.

This paper was never intended to be an all-inclusive, short-course on practice before the Bureau of Land Management, but was, at most, intended to provide a skeletal outline of some of the basic problems and procedure with which the practitioner must be familiar when he enters this field.

FEDERAL INTERLOCUTORY APPEALS ACT—A FIVE YEAR VIEW

*Thomas D. Bourdeaux**

I. Introduction

Prior to 1958, the right of litigant in federal court to have a review by the court of appeals of an interlocutory order was limited to a few special circumstances.[1] In fairly rare instances review was accomplished—employing the All Writs Act[2]—by petitioning the court of appeals for a writ of mandamus or prohibition directed to the district judge alleged to be in error requiring him to act or refrain from acting in the manner sought by the petitioner.[3]

On September 2, 1958, the Congress amended 28 U.S.C. section 1292 to add as subsection (b) the following language:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[4]

Five years have now passed since the adoption of the act and our purpose here is to take a look at how the courts, particularly the Court of Appeals for the Fifth Circuit, have interpreted and applied it. However, by reference to some of the reported decisions, patterns can be discerned.

II. Substance

The statute establishes certain prerequisites to a court of appeals considering an appeal from an interlocutory order in a civil matter. The

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[1] 28 U.S.C. § 1292 (1958), which provided for appeals from interlocutory orders involving injunctions, certain aspects of receiverships, admiralty matters, and patent infringement cases. Certain interlocutory bankruptcy orders are appealable under 66 Stat. 423 (1952), 11 U.S.C. § 47 (1958).

[2] 28 U.S.C. § 1651 (1958).

[3] LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); *In re* Watkins, 271 F.2d 771 (5th Cir. 1959).

[4] 72 Stat. 1770 (1958), 28 U.S.C.A. § 1292 (Supp. 1962).

district judge must certify in the order from which appeal is sought that he is of the opinion that such order (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) the ultimate termination of the litigation will be materially advanced by an immediate appeal.

By reference to the legislative history made by the act in the course of its passage through Congress, it can be seen that there was no intent to permit the use of the act except in exceptional cases.[5] The courts generally have followed the strictures of the congressional committees regarding unrestricted use of the interlocutory appeal machinery.[6]

A. Controlling Question of Law

There has been reluctance on the part of the various courts of appeal to make any definitive statement on what constitutes a "controlling question of law." Judge John Brown of the Court of Appeals for the Fifth Circuit best expressed this reluctance:

> [W]e have thus far resisted the temptation to chart out the types of cases or circumstances in which this new type of appeal should be allowed. The statute was framed in broad language and the term "controlling question of law as to which term is substantial ground for difference of opinion . . ." which "may materially advance . . . termination of the litigation . . ." avoids casting it in the unyielding molds of prior terms of procedural art.[7]

The propriety of the transfer of an in rem proceeding in admiralty, upon application of a willing claimant, to a court in a district in which

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[5]"[A]ppeals under this legislation should only be used in exceptional cases where an intermediate appeal may avoid protracted and expensive legislation and is not to be used or granted in ordinary litigation wherein the issues raised can otherwise be properly disposed of." H.R. Rep. No. 1667, 85th Cong. 2d Sess. 2.

"[W]hile it may be desirable to permit appeals from interlocutory order in certain instances, the indiscriminate use of such authority may result in delay rather than expedition of cases in the district court. Obviously such appeals should not be allowed if they are filed solely for the purpose of delay or are based upon spurious grounds." S. Rep. No. 2434, 85th Cong. 2d Sess. A. 3.

[6]According to statistical data gathered by the Clerk of the Court for the Fifth Circuit the following table shows number of applications to the Court for interlocutory appeals and the number granted and refused by fiscal years:

Fiscal Year	*Granted*	*Denied*	*Total*
1960	5	5	10
1961	4	7	11
1962	14	2	16
1963	7	9	16

Letter from Edward Wadsworth, Clerk, to author, September 5, 1963.

[7]Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 702 (5th Cir. 1961).

the original res was not located was certified and considered as a controlling question of law by the Court of Appeals for the Fifth Circuit.[8]

Yet, the Court of Appeals for the Third Circuit had to consider a petition for a writ of mandamus or prohibition to prevent transfer of certain causes to another venue.[9] The district judge had refused to certify that his interlocutory order transferring the causes involved a "controlling question of law."[10]

The question of whether Louisiana's statute of limitations barred an action for damages from cancer alleged to have been caused by smoking defendant's product was certified for interlocutory appeal under section 1292 (b) and considered by the court of appeals.[11]

An order requiring a government agency to produce certain documents in face of a governmental claim of privilege was held by the Court of Appeals for the Ninth Circuit not to involve controlling "issues" so as to entitle the government to an interlocutory appeal.[12]

Whether or not the reference to a master for determination of all issues deprived a litigant, unconstitutionally, of a jury trial was held in *In re Watkins* not to be a question for decision on interlocutory appeal.[13]

In one case the amount of attorney's and other fees allowed in a minority stockholders' suit was not reviewed, as the court was not satisfied that the order allowing the fees in question was an interlocutory order.[14]

In the case of *Oskoian v. Canuel* appeal was allowed to settle the question of whether or not under state law an international union

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[8]Continental Grain Co. v. Federal Barge Lines, Inc., 268 F.2d 240 (5th Cir. 1959), *aff'd sub nom.* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960).

[9]Barrack v. Van Buren, 309 F.2d 953 (3d Cir. 1962).

[10]Substantially, the same question was involved in *Ex parte* Deepwater Exploration Co., 260 F.2d 546 (5th Cir. 1958). On petition for mandamus the Court of Appeals suggested the interlocutory appeal route. District judge refused to make required certificate so leave to file for mandamus was granted.

[11]R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963). The trial judge had refused to grant summary judgment on defendant's motion pleading the statute of limitations.

[12]United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959).

[13]See *In re* Watkins 271 F.2d 771 (5th Cir. 1959). The decision turned on the narrow ground that the trial judge's certificate was "inadequate in substance to show a probably dispositive question." The trial judge in his order said: "Hence the primary question here is: Do the pleadings require . . . a jury trial? . . . I, therefore, certify this condition to the Court of Appeals . . . , with the request it decide whether this case must, under the constitution, be tried to a jury." Leave to petition for writ of mandamus had been sought prior to passage of Act of September 2, 1958. The Court of Appeals pretermitted decision to give the trial judge opportunity to issue certificate under the Act. Writ of mandamus was subsequently issued.

[14]In the Matter of Heddendorf, 263 F.2d 887 (1st Cir. 1959).

had the capacity to be sued for a tort of the union by a complaint against individual defendants as representatives thereof.[15]

It was held in *Crowe v. Ragnor Benson, Inc.* that an order of a district court vacating a default judgment was not appealable.[16] Neither are questions involving attorney-client relationships.[17]

The district courts have generally exercised restraint in certifying appeals from interlocutory orders. For example, an appeal from an order denying motions to dismiss a complaint for failure to state a cause of action was not allowed on the ground that, even if the court of appeals reversed, time would be allowed for the complaint to be amended and the question of law involved which related to the form in which a claim should be pleaded were not controlling within the meaning of the act.[18]

In *Berger v. United States,* an interlocutory appeal was denied on the ground "there is not enough likelihood of success upon the appeal to warrant the exercise of my discretion in expediting it."[19]

Although recognizing that an important legal question was involved about which there was disagreement among the judges in the district, appeal was denied in a Jones Act case because the case was not exceptional, but like any other case under the act.[20]

On the ground that the trial of the case would take only a week, the district judge in *Biggers v. Bankers Bond Co.*[21] refused to certify an order denying a motion to amend a counterclaim.

While some criticism might be directed toward a court's reasoning in isolated instances for allowing an interlocutory appeal as to particular questions as being without the intent of the statute, by and large, the courts have satisfied themselves that the advantages to be obtained from such an appeal outweigh the delay inherent in such a course.

B. Substantial Ground for Difference of Opinion

It will be noted that the statute does not say there must be a difference of opinion as to "controlling question of law," only that there be "substantial ground" for such difference. The courts are not, there-

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[15]264 F.2d 591 (1st Cir. 1959).

[16]307 F.2d 73 (3rd Cir. 1962).

[17]Willheim v. Murchison, 312 F.2d 399 (2d Cir. 1963), *dismissing appeal from* 206 F. Supp. 733 (S.D.N.Y. 1962).

[18]Kroch v. The Texas Co., 167 F. Supp. 947 (S.D.N.Y. 1958).

[19]170 F. Supp. 795, 796 (S.D.N.Y. 1959).

[20]Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A., 168 F. Supp. 236 (S.D.N.Y. 1958).

[21]171 F. Supp. 94 (W.D. Ky. 1959).

fore, required to make a tabulation of the positions taken by the various circuits on the given question. In practice there has been very little regard given to whether or not there is substantial ground for difference of opinion.

In *Corabi v. Auto Racing, Inc.*,[22] however, the trial judge specifically stated that he was certifying a question for interlocutory appeal as to which he believed the previous rulings of the Third Circuit to be at variance with those of other courts of appeals. But in *In the Matter of Heddendorf*,[23] appeal was denied although the "petition also cited impressive authority in opposition to the view of these questions of law allegedly subscribed to by the district court, which tends to show a 'substantial ground for difference of opinion.'"

Difference of opinion among district judges in the same district was not sufficient to get an interlocutory appeal allowed in *Bobolakis v. Compania Panamena Maritima San Gevassimo, S.A.*[24]

C. Advance Termination of Litigation

While the earliest court of appeals opinion dealing with the Interlocutory Appeals Act stated that "it was to be used only in exceptional cases where an intermediate appeal may avoid protracted or expensive litigation. . ."[25] there have been few instances where the material advancement of the ultimate termination of the litigation has played any significant part in the allowance of an appeal under the act.

It was pointed out, by way of dicta in *In the Matter of Heddendorf*, that "an exceptional case might be one where the district court has denied a motion to dismiss for want of jurisdiction which raised a novel question and is reluctant to embark upon an extended and costly trial until assured that its decision on the motion to dismiss is sustained."[26]

III. Procedure

It has been suggested that the statute does not require, nor even expressly contemplate, an application for the requisite certificate from the parties.[27] However, caution certainly dictates that a party feeling aggrieved of an interlocutory order to be entered by a district judge should, without delay, request that there be included in the body of

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[22]264 F.2d 784 (3d Cir. 1959).

[23]263 F.2d 887, 890 (1st Cir. 1959).

[24]168 F. Supp. 236 (S.D.N.Y. 1958).

[25]Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3rd Cir. 1958).

[26]263 F.2d 887, 888 (1st Cir. 1959).

[27]See Wright, *The Interlocutory Appeals Act of 1948*, 23 F.R.D. 199 (1959).

the order a precise and accurate statement of the question involved together with the required certificate of the trial judge.[28]

From a procedural standpoint, the act sets only two requirements: (1) The certificate should be stated in the order from which appeal is sought, and (2) application for appeal must be made to the court of appeals within ten days after the entry of the order.[29]

There was developed a division among circuits as to whether the ten days commenced running from the date of the order or from the date of the entry of any supplemental order which contained the requisite certificate. The strict view has been adopted by the Court of Appeals for the Third Circuit that the time begins to run from the day of the entry of the questioned order.[30] This holding is certainly in accord with the language of the statute. There is nothing in the statute which contemplates that there will be a supplemental order entered containing the certificate of the trial court.

However, the Second and the Tenth Circuits, explicitly, and the Fifth Circuit,[31] impliedly, have adopted different views. In *Houston Fearless Corp. v. Teter*,[32] the Court of Appeals for the Tenth Circuit reviewed the previous holdings of its sister circuits on this point and held, as had the Second Circuit,[33] that the ten day period did not begin to run on the day the interlocutory order itself was entered, but on the day that a supplemental order might be entered containing the statement of the court's certificate required by the statute.

Some of the circuits have adopted rules of practice and procedure to be followed in perfecting an interlocutory appeal. Others, including the Court of Appeals for the Fifth Circuit, have not. It would seem that

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[28]See In the Matter of Heddendorf, 263 F.2d 887 (1st Cir. 1959), where the trial court merely said, "Pursuant to the amendment to 28 U.S.C. § 1202 . . . this Court certifies that an immediate appeal from this order may be taken." This "shorthand" certificate was criticized, but application for appeal was not denied on this basis.

[29]*But see Ex parte* Deepwater Exploration Co., 260 F.2d 546 (5th Cir. 1958); *Ex parte* Watkins, 260 F.2d 548 (5th Cir. 1959), where the Fifth Circuit has at least suggested, in passing on application for leave to file for writs of mandamus, that the applicants go back to the district judge for certification for interlocutory appeal where the ten days from entry of the order in question has long since passed.

[30]Milbert v. Bison Laboratories, Inc., 260 F.2d 431 (3rd Cir. 1958), but the court did state that a motion may be filed within the ten days to amend the order by adding the certificate which will toll the running of the period.

[31]See *Ex parte* Deepwater Exploration Co., 260 F.2d 546 (5th Cir. 1958); *Ex parte* Watkins, 260 F.2d 548 (5th Cir. 1959).

[32]313 F.2d 91 (10th Cir. 1962).

[33]Mueller v. Rayon Consultants, Inc., 271 F.2d 591 (2nd Cir. 1959). See also Brown v. Bullock, 294 F.2d 415 (2nd Cir. 1961) in which appeal was considered although the original order contained no certificate as required but was subsequently amended so as to start interlocutory appeal on its way.

once the proper certificate has been obtained from the district judge, a petition should be filed with the clerk of the court of appeals seeking leave from the order in question.

As one court put it:

> In deciding whether to grant leave to pursue the interlocutory appeal, this court necessarily must rely upon the would-be appellant to supply in his petition, or in a supporting memorandum attached thereto, a certified copy of the challenged order, a concise but adequate presentation of facts showing the proceedings below prior to the challenged order and the proceedings remaining in the district court, and a statement of the precise nature of the controlling question of law involved, together with a brief argument showing the grounds for the asserted difference of opinion and the way in which the allowance of the petition would "materially advance the ultimate termination of the litigation." The other party, who would become the appellee if the petition were granted, might then express any disagreement on the desirability of interlocutory review, in such papers in opposition as he should choose to file in the three days allowed to him.[34]

It should be remembered in preparing to seek an interlocutory appeal that the proceedings in the district court are not stayed pending the appeal unless "the district judge or the court of appeals or a judge thereof shall so order."

IV. Conclusion

The Interlocutory Appeals Act of 1958 can be a valuable tool in bringing about the early and orderly termination of litigation when employed with self-restraint. It should be noted that three-fourths of the judges who consider such an appeal must concur in the propriety thereof before it can be allowed.[35]

If employed in run-of-the-mill cases to settle issues which would not tend to be dispositive of the entire case, then the legislative intent is being abused. The potential for evil inherent in the statute must be guarded. "Several systems of state courts stand as eloquent witness of the dangers involved in indiscriminate interlocutory review. The statute does not guard against those dangers by restricting the availability of review but leaves this instead to the discretion of the courts."[36]

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[34]In the Matter of Heddendorf, 263 F.2d 887 (1st Cir. 1959). The "three days" mentioned therein undoubtedly refers to a rule of that circuit.

[35]Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (1961), where the court stated that the district judge and two of the three members of the court of appeals panel must concur.

[36]Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 210 (1959).

State Bar Section

REFLECTIONS ON THE JUDICIAL PROCESS*

The judicial process is many things. It is the stream of life, involving the life, liberty, and property of Everyman. It is the constant battle between continuity and tradition, on the one hand, and the ebb and flow of the tides of economics, social, and philosophic attitudes. It is the earthy experience of the faults and foibles of man, but also a precursor of what he can be in his finest and truest moments. And not infrequently, it is an essential part of the democratic process, an attempt to understand and apply the eternal verities of the constitution, and to give substance to those otherwise empty universals of fundamental law. In a healthy society it must balance the two indispensables—stability and change.

And so it is no surprise to observe the comment made about Mr. Chief Justice Waite. His appointment to the United States Supreme Court came as a considerable surprise to Waite, an obscure Ohio lawyer, leading one legal wag to observe: "Waite is that luckiest of all individuals known to the law, an innocent third party without notice." But to the innocent purchaser, after a few years on the bench, there comes a vague and disquieting awareness of the nature of this tiger which he has by the tail. The judge worth his salt tries to learn its characteristics, its nature and feeding, and a method of living and coping with it.

There are many definitions of judges, some ribald, some kindly, but perhaps the most blunt (and relatively inaccurate) is a modern version of Lord Chancellor Lyndhurst's definition of a good judge: "First, he must be honest. Second, he must possess a reasonable amount of industry. Third, he must have courage. Fourth, he must be a gentleman. And then, if he has some knowledge of law, it will help!"

I.

The qualities which one should bring to the task of judging are many. No one fully comprehends their scope. And even if they were known, no mere human could adequately meet all standards. However, there are certain fundamentals. The first, the sine qua non, is honesty, not merely pecuniary but also intellectual. Forthrightness in deciding cases requires candor and directness in analysis and statements of facts and legal issues, a frank recognition of the weaknesses as well as the virtues of a particular disposition, without evasion or obscurity, and the reasons for the ultimate decision.

Impartiality is of equal importance. Judges should be free from every tie which may sway their judgment, so that justice may be ad-

*By W. N. Ethridge, Jr.; Associate Justice, Supreme Court of Mississippi.

ministered equally to all. Somewhat related is a quality which Learned Hand called "complete personal detachment." One must take care to avoid prejudgment, to remove the decision process from emotional or instinctive predilections, to be "detached almost to the point of being aloof."[1] The perceptive disposition of cases also requires imagination, a consideration of the different possible patterns that will fit the facts and the issues. From them the judge must make his choice, after appraisal of all consequences.

The capacity for hard work is requisite, because before any intelligent choice between alternatives can be made, one must master the evidence, the pertinent law, and the issues. This requires a careful study of the record and the authorities. And perhaps of primary importance is humility. This does not suggest indecision, after full consideration. Humility implies freedom from pride and arrogance, an awareness of one's inadequacies in dealing with a wide range of problems. In the realm of human affairs there are no absolutes. Before deciding a case one must plow through the facts, the law, the precedents, policy, and history, and reach the best judgment that fallible creatures can reach in that most difficult of all tasks, achieving justice between men.

In the Greek sense of pathos, there is a peculiar loneliness about a judge's work. This is doubly true of the appellate bench, because the appellate judge does not have the opportunities and time for maintaining continuous and frequent personal relationships with the bar and the general public, as does a trial judge. He must be circumspect about his friendships, his comments on public issues, and references to current controversies. These very matters often become strongly controverted issues in later litigation.

The ingredients of decision must be drawn from his own mind and heart. As Holmes once said: "But if he is a man of high ambitions he must leave even his fellow-adventurers and go forth into a deeper solitude and greater trials. He must start for the pole. In plain words, he must face the loneliness of original work. No one can cut new paths in company. He does that alone."[2]

The great mass of litigation does not require significant extensions of doctrines or new directions. But the challenge and zest of the law, for the jurist, lie in those cases in which he can clarify obscurities, expand or contract doctrines as needed, or begin anew, within accepted traditions, a rational search for principles which may cope adequately with contemporary needs and mores. Cases are not great because of the interests or parties involved, but because the judge recognizes the essential issues, tests them in the fires of reason and tradition, and with

[1]Proceedings in Commemoration of Fifty Years of Federal Judicial Service by Learned Hand, 264 F.2d 6 (1959).

[2]BOWEN, YANKEE FROM OLYMPUS 249 (1945).

clarity directs them toward a more perfect accommodation with the highest standards of his own world. No illusion of finality or certainty should becloud his labors, because each generation must build for itself, on the past, present, and future. The search for reasonableness and fairness in the decision of human conflicts is unending.

II.

Every field of substantive law contains three principal kinds of topics, each of which serves important, distinctive functions. The narrowest and most numerous of these are "rules," which comprise the specific parts of a narrow proposition. As Jerome Hall states it (in the field of criminal law), the rules comprise the specific parts of the penal code, and in conjunction with the doctrines, they define particular crimes. Next are the "doctrines" of criminal law, which, for example, concern insanity, infancy, intoxication. These doctrines express the common material parts and definitions of the specific crimes, while the rules state what is distinctive about each crime. Third, there are the "principles" of a system of law, such as criminal law, which are wider, "higher-level" generalizations than the doctrines, and which may be viewed as "standing outside of the law, as the ultimate norms." The principles of criminal law, for example, consist of seven ultimate notions, including *mens rea*, act, the concurrence of *mens rea* and the act, form, causation, punishment, and legality.[3]

These rules, doctrines, and principles, when applied to the facts of particular cases, preclude any success in finding certainty in the law. Cardozo concluded that uncertainty was inevitable.[4] In part, the judicial process is not discovery but creation. Nevertheless, Karl Llewellyn, in his classic, *The Common Law Tradition: Deciding Appeals*, shows there are many factors tending toward predictability or reconciliability of decision, among which are tradition, known doctrinal techniques, law-conditioned officials, issues which are limited and sharpened, adversary argument by counsel, group decision, and a known bench.

However, words are very imperfect means of communication, and contribute to uncertainty in the law. That is one of the occupational risks of a judge. For example, a Massachusetts doctor charged with procuring an abortion argued to the Supreme Judicial Court that he was protected by the statute of frauds—no one should be held liable for the debt, default or miscarriage of another, unless evidenced by some memorandum in writing!

But a judge cannot live in the "astral serenity of syllogisms, immune to emotional disturbances" and varieties of facts. So "the person who

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[3]HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 17-20 (2d ed. 1960).

[4]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178-80 (1921).

compares a decision to a syllogism does not see the decision as a living reality; he observes only its desiccated outer form." Every realistic lawyer must admit that the outcome of a case cannot be predicted with certainty. The facts, the rules, doctrines and principles, must be measured by the judge's own knowledge, experience, perception, and capacity for work and understanding. Phrases such as "good faith," "reasonably prudent operator" and "due care" may be called "the respiratory organs or the safety valves" of the legal system.[5]

III.

In a democracy the people speak through the legislature and the jury. Stability in law and government is the function of the courts. The doctrine of separation of powers imposes on them that major responsibility. At all hazards a judge "must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery."[6] In short, a judge should develop the law in the common law tradition, applying creative reasoning and a sense of historical continuity. Learned Hand's technique was aptly defined in this way:

> Rather he built inductively with existing materials to provide continuity without rigidity, to preserve for the people alone power to make major shifts in social policy. He did not worship the past, but he knew that without respect for past commitments judicial law is lawless, *i.e.*, ad hoc and retroactive, providing no standard by which men can order their affairs.[7]

Vagueness in the Constitution should be resolved principally by the legislature, not the courts. The essence of legislation in a democracy is compromise. Assuredly a legislative judgment should be upheld by the court, unless it can be said that there is no reasonable basis for the choice. It is the legislature's function to strike an acceptable balance between conflicting social interests, not that of the courts.

So in applying the rule of law in constitutional litigation, courts should have a secondary role. For example, commitment to a preferred class of libertarian interests has no place in adjudication. The judicial activists argue that their values are fundamental, but by the same token, the property-minded activists of thirty years ago thought that their views dealt with fundamentals.[8] Accordingly, judicial self-restraint and historical continuity are important and, in fact, essential. Personal preferences ought to be kept in check when performing judicial duties.

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[5]Piero Calamendrei, Procedure and Democracy 22-34 (1956).

[6]Hand, The Spirit of Liberty 130 (3d ed. 1960).

[7]Mendelson, *Learned Hand: Patient Democrat*, 76 Harv. L. Rev. 322, 326 (1962).

[8]*Id.* at 326.

As Learned Hand once put it, ". . . It would be irksome to be ruled by a bevy of Platonic guardians, even if I knew how to choose them, which I assuredly do not."[9]

In 1840 Alexis de Tocqueville wrote the second part of his *Democracy in America.* One chapter was entitled "What Sort of Depotism Democratic Nations Have to Fear."[10] In it he cautioned:

> The first thing that strikes the observation is an innumerable multitude of men, all equal and alike, incessantly endeavoring to procure the petty and paltry pleasures with which they glut their lives. . . . As for the rest of his fellow citizens, he is close to them, but does not see them; . . . Above this race of men stand an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. . . . For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness. . . . Thus it every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself. The principle of equality has prepared men for these things; it has predisposed men to endure them and often to look on them as benefits.
>
> After having thus successively taken each member of the community in its powerful grasp and fashioned him at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.[11]

I do not think this caveat of de Tocqueville has come to pass in this country, but it is well to remember it. The American Constitution not only distributes the powers of government, but seeks to lay down general principles to insure the just exercise of those powers. This is an important contribution of our nation to political science. The federal-state relationship has always been complex and difficult. As indicated by the 1958 Report of the National Conference of Chief Justices, the bench and bar of the nation have reflected a growing concern over the danger of abrogation by the federal courts of the essential nature of

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[9]HAND, THE BILL OF RIGHTS 73 (1958).

[10]DE TOCQUEVILLE, DEMOCRACY IN AMERICA 316 (1948).

[11]*Id.* at 318-19.

our federal system. This problem transcends the important school segregation cases, and extends into many other fields, such as the use of the general welfare clause, grants-in-aid, the doctrine of pre-emption, labor relation cases, state law and diversity cases, taxation, state legislative investigations, admissions to the bar, state administration of criminal law, and legislative reapportionment. Certainly the overall tendency of federal decisions over the past twenty-five years or more has been to press the extension of federal power and to press it rapidly.

There is a need for more faith by the courts in the legislative process, which in a democracy is largely a matter of give-and-take, a process of compromise. The rule of law in constitutional litigation should be on rational grounds within accepted legal traditions. In the long run, I would suggest a *modus vivendi*, a practical method of adjusting federal-state relationships, should be developed in the Congress, not by the courts. Theories rejected 100 years ago, broad generalities, and emotional attitudes do not help, but hinder resolution of great issues in the American tradition.

On the other hand, emotional presuppositions by judicial activists may well lead to abrogation of a basic right in any free society—the right of privacy and individual control of private property, outside of one's public obligations. There is today a danger that the concept of "state action" under the fourteenth amendment may extend to the acts of any privately owned and operated business, even in the absence of state legislation affecting it.[12] One may inquire whether this is the type of authoritarian dogma against which de Tocqueville warned. Yet whatever the answer, the mere evidence of its serious consideration indicates a danger of departure from the American doctrine of unity in diversity, all for the sake of a libertarian ideal.

Judicial activists do not allow sufficient play in the joints of a government. Their predilections, their major premise, determine their own absolutes. There is no room for legislative accommodations and adjustments in such a society—for the kind of faith which Joseph Hutcheson said a judge must have:

> If you ask me, faith in what, I must tell you faith in the natural law principles upon which our freedom depends, faith in the rights of man, faith in the constitution which declares and in the constitutional way of life which protects them, faith in law as liberator, faith in the justice of the general will, faith in the American way of life, faith, in short in the principles and practices which in Madison's immortal phrase "enable the government to control the governed, yet also oblige it to control itself."[13]

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[12]Peterson v. City of Greenville, 83 Sup. Ct. 1119 (1963); Lombard v. Louisiana, 83 Sup. Ct. 1122 (1963).

[13]Hutcheson, *In Praise of Lawyers and Lawing*, 21 TENN. L. REV. 30-31 (1949).

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Student Comments

GIFT BY WILL OR INTESTACY ON INFORMAL TRUST IN MISSISSIPPI

I. Introduction

The scope of this comment is a discussion of the imposition of constructive trusts based upon the breach of a parol promise by an heir or beneficiary to a testator to hold property for another.[1] Special emphasis is accorded the Mississippi case, *Stovall v. Stovall*,[2] and its apparent effect upon the doctrine of constructive trust as a device of restitution in Mississippi.[3]

II. General Background

A. Definition

The constructive trust is a "creature of equity"[4] which, as a device of restitution,[5] has such varied application that it defies all attempts of accurate and concise definition.[6] It has frequently been called a trust "ex maleficio,"[7] a trust "ex delicto,"[8] and a trust "de son tort"[9] when based on the wrongful conduct of the constructive trustee.[10] The terms "implied trust,"[11] "involuntary trust,"[12] and "trust in invitum"[13] have been used to emphasize the lack of any intention on the part of the

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[1]For discussions and collections of authorities within the general scope of this comment, see Ames, *Constructive Trusts Based upon the Breach of an Express Oral Trust of Land*, in Lectures on Legal History 425 (1913); Bogert, Trusts and Trustees § 498 (2d ed. 1960); Scott, Trusts §§ 55.1-55.5, 488-491 (2d ed. 1956); Costigan, *Constructive Trusts Based on Promises Made to Secure Bequests, Devises, or Intestate Succession*, 28 Harv. L. Rev. 237, 366 (1915); Costigan, *Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantees*, 12 Mich. L. Rev. 423, 515 (1913); Restatement, Restitution, §§ 160, 186 (1937); Restatement (Second), Trusts §§ 44(1), 45(1), 55 (1959); Annot., 66 A.L.R. 156 (1930); Annot., 98 A.L.R. 474 (1935); Annot., 102 A.L.R. 588 (1936); Annot., 155 A.L.R. 106 (1945); Annot., 11 A.L.R.2d 808 (1950); Annot., 8 L.R.A. (n.s.) 698 (1907); Annot., 31 L.R.A. (n.s.) 176 (1911); Annot., 33 L.R.A. (n.s.) 996 (1911).

[2]218 Miss. 364, 67 So. 2d 391 (1953).

[3]See Note, 25 Miss. L.J. 274 (1954).

[4]See Steiner v. Fecycz, 72 Ohio App. 18, 26, 50 N.E.2d 617, 621 (1942).

[5]See Gwin v. Gwin, 240 Mo. App. 782, 219 S.W.2d 282, 285 (1949).

[6]Scott, Trusts § 462 (2d ed. 1956).

[7]Price v. Morrison, 291 Mo. 249, 236 S.W. 297 (1921).

[8]Orth v. Orth, 145 Ind. 184, 44 N.E. 17 (1896).

[9]Central Stock & Grain Exch. v. Bendinger, 109 Fed. 926 (7th Cir. 1901).

[10]Bogert, Trusts and Trustees § 471 (2d ed. 1960).

[11]See Des Moines Terminal Co. v. Des Moines Union Ry., 52 F.2d 616 (1931).

[12]See Newman v. Newman, 60 W. Va. 371, 55 S.E. 377 (1906).

[13]See Saunders v. McDonough, 218 Ala. 207, 118 So. 389 (1928).

constructive trustee to be such.[14] Judge Cardozo, speaking for the Court of Appeals of New York, stated that "a constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to other,"[15] and, in *Beatty v. Guggenheim Exploration Co.*[16] he gave a more nearly complete description of a constructive trust when he said: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."[17] Perhaps the best definition for the purposes of this study is the one found in the *Restatement of Trusts* and quoted with approval by the Mississippi court:[18] "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that . . . he would be unjustly enriched if he were permitted to retain the property."[19]

B. Application

By the great weight of authority[20] a constructive trust will be declared and enforced against a legatee[21] or devisee,[22] and in favor of the intended *cestui que trust*, where that legatee or devisee, knowing that the testator in giving him the devise or bequest intended it to be applied to another's benefit,[23] either expressly promised[24] or by his action at the time implied,[25] that he would carry the testator's intention into effect, and the property is left to him in the faith[26] of the testator that the promise will be kept.[27] In a minority of the jurisdictions it has been held that only where the legatee or devisee is *active in inducing*[28] the legacy or devise, or intends at the time of the promise or assurance to repudiate

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[14]BOGERT, *op. cit. supra* note 10, § 471.

[15]Meinhard v. Salmon, 249 N.Y. 458, 467, 164 N.E. 545, 548 (1928).

[16]225 N.Y. 380, 122 N.E. 378 (1919).

[17]*Id.* at 386, 122 N.E. at 380.

[18]See Pitchford v. Howard, 208 Miss. 567, 583, 45 So. 2d 142, 147 (1950).

[19]RESTATEMENT (SECOND), TRUSTS § 1, comment *e* (1959). See also 4 SCOTT, TRUSTS § 462 (2d ed. 1956); RESTATEMENT, RESTITUTION § 160 (1937).

[20]For minority cases, see notes 28-30 *post.*

[21]See, *e.g.*, Brook v. Chappell, 34 Wis. 405 (1874).

[22]See, *e.g.*, Mead v. Robertson, 131 Mo. App. 185, 110 S.W. 1095 (1908).

[23]See Russell v. Jackson, 10 Hare 204, 68 Eng. Rep. 900 (Ch. 1852).

[24]See, *e.g.*, Gilpatrick v. Glidden, 81 Me. 137, 16 Atl. 464 (1888).

[25]See, *e.g.*, Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 (1910).

[26]See, *e.g.*, Barron v. Stuart, 136 Ark. 481, 207 S.W. 22 (1918).

[27]For collections of authorities see Annot., 66 A.L.R. 156 (1930); Annot., 155 A.L.R. 106 (1945).

[28]*Cf.* Collins v. Hope, 20 Ohio 493 (1851), but as to the Ohio rule today see Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 (1910).

it after the death of the testator,[29] or is in a relation of special trust and confidence toward the testator,[30] will he be charged as trustee. Trusts have been imposed in situations where the legatee or devisee induced the decedent to make a will[31] or prevented him from revoking one[32] by wrongful means. Similarly, a constructive trust will be imposed where the heir or next of kin of the decedent, by wrongful conduct, induced the decedent to revoke a will[33] or prevented him from making one[34] in order to acquire property by intestate succession.[35]

1. *Nature of the Promise*

There are many various types of promises which will serve to make retention by the legatee or devisee unconscionable.[36] It need not be a promise expressly to hold in trust;[37] it may be a promise to pay to the intended beneficiary money derived out of the property,[38] to convey land to him,[39] or to devise to him.[40] It must, however, be a promise intended to be binding, and not merely precatory words.[41] While a promise by a devisee[42] or legatee[43] to carry out the wishes of the testator as to the disposition of the whole or a portion of the devise or bequest is essen-

[29]*Compare* Evans v. Moore, 247 Ill. 60, 93 N.E. 118 (1910), where the absence of a fraudulent intent on the part of the promisor at the time of making the promise prevented the enforcement of a trust (although equitable relief was given on other grounds) *with* Powell v. Yearance, 73 N.J. Eq. 117, 67 Atl. 892 (Ch. 1907).

[30]*Cf.* Noble v. Noble, 255 Ill. 629, 99 N.E. 631 (1912).

[31]See Marriot v. Marriot, 1 Str. 666, 93 Eng. Rep. 770 (Ch. 1726), where a scrivner, employed to draft testator's will, fraudulently inserted his own name instead of that of an intended legatee, and was charged in equity as a constructive trustee for the intended legatee.

[32]Brazil v. Silva, 181 Cal. 490, 185 Pac. 174 (1919), where devisee, by fraudulently pretending to destroy a will, prevented testator from revoking it, she was held to be constructive trustee of the devise for testator's heirs.

[33]Thynn v. Thynn, 1 Vern. 296, 23 Eng. Rep. 479 (Ch. 1684).

[34]*Compare* Lewis v. Corbin, 195 Mass. 520, 81 N.E. 248 (1907), where the heir who wrongfully prevented testator's execution of a will was said to hold in trust for the intended legatee, *with* Hall v. Hall, 91 Conn. 514, 100 Atl. 441 (1917) which suggests that heir's remedy is an action at law for damages.

[35]See Scott, Trusts § 489 (2d ed. 1956).

[36]For a collection of cases, see Annot., 66 A.L.R. 156, 159 (1930).

[37]*Cf.* Chamberlaine v. Chamberlaine, 2 Freem. 34, 22 Eng. Rep. 1041 (Ch. 1678).

[38]See, *e.g.*, Vreeland v. Williams, 32 N.J. Eq. 734 (Ch. 1880), *affirming* 32 N.J. Eq. 135 (Ch. 1880).

[39]*Accord,* Benbrook v. Yancy, 96 Miss. 536, 51 So. 461 (1910).

[40]See, *e.g.*, Laird v. Vila, 93 Minn. 45, 100 N.W. 656 (1904).

[41]McCormick v. Grogan, L.R. 4 H.L. 82 (1869).

[42]See, *e.g.*, *In re* Holt, 61 Cal. App. 464, 215 Pac. 124 (1923).

[43]See, *e.g.*, Wallgrave v. Tebbs, 2 Kay & J. 313, 69 Eng. Rep. 800 (Ch. 1855).

tial,[44] it need not be expressly made. Active cooperation[45] or silent acquiescence[46] may have the same effect as an express promise.

2. *Fraud*

According to some of the earlier cases, the jurisdiction of equity to establish a constructive trust in such situations rests upon the ground of fraud,[47] and, in the absence of some active or positive fraud in procuring the devise,[48] courts will not impose a trust. Later cases developed the rule that the fraudulent intent of the devisee or legatee not to carry out the wishes of the testator may have been formed either at the time of the making of the devise or legacy, or subsequent thereto.[49] The modern tendency in regard to the fraud required in such cases was perhaps best expressed by the court in *Powell v. Yearance*,[50] where it was said:

> Trusts, in cases of this character, are impressed on the ground of fraud, actual or constructive, and the basis or ground upon which fraud is imputed is that of holding the estate of testator against conscience. It is not based necessarily on any imputation of fraud, or intention to defraud at the time of making the promise, but of afterwards holding or attempting to hold . . . the estate free from the effect or obligation of a promise, subject to which it was intended to be devised and received and which it is obligatory in conscience to carry out. Where the estate or interest therein is thus received by the person who made the promise, the attempt to hold the estate without performing the promise, is an actual fraud, for the reason that the recipient, having actually made the promise, knows personally of the obligation, and is guilty of actual fraud in holding or attempting to hold the estate without performing the promise, so far as his interest in the estate extends.[51]

According to a majority[52] of cases, therefore, where the trust is repudiated, it is not necessary to show that the promise on which it was based was fraudulently made with no intention of carrying it out. A fraudulent intent, on the part of the promisor in making the promise, may be inferred from his repudiation and a refusal to perform.[53]

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[44]Crinkley v. Rogers, 100 Neb. 647, 160 N.W. 974 (1916).

[45]Richardson v. Adams, 18 Tenn. 204 (1837).

[46]Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 (1910).

[47]*E.g.*, Vreeland v. Williams, 32 N.J. Eq. 734 (Ch. 1880).

[48]See Hoge v. Hoge, 1 Watts 163 (Pa. 1832).

[49]*Compare* Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 (1910), *with* Sprinkle v. Hayworth, 67 Va. (26 Gratt.) 384 (1875).

[50]73 N.J. Eq. 117, 67 Atl. 892 (Ch. 1907).

[51]*Id.* at 896. *But see*, Evans v. Moore, 247 Ill. 60, 93 N.E. 118 (1910) where the court refused to impose a constructive trust, holding that it is necessary to show a fraudulent intent on the part of the devisee or legatee in obtaining the gift.

[52]For the minority cases see Annot., 155 A.L.R. 106, 114 (1945).

[53]Wiseman v. Guernsey, 107 Neb. 647, 187 N.W. 55 (1922).

3. *Effect of the Statute of Wills and Frauds*

One of the chief obstacles to carrying out the testator's intention lies in the Statute of Wills, since the testator is, in substance, making a testamentary disposition without indicating in a duly attested will who is to be the beneficial recipient of his bounty. Up to the moment of his death, the testator is free to dispose of the property as he likes. The situation is different from that which arises where the testator makes a binding contract as to the disposition of his property on his death. If, prior to his death, the testator makes an agreement with the intended devisee to devise property to him in consideration of his agreement to either hold the property in trust for, or reconvey it to another, the testator is not making a testamentary disposition, and the agreement is enforceable unless it violates the Statute of Frauds.[54] Such a contract is either unilateral (the act or property being actually given for the prospective testator's promise) or is bilateral (mutual promises). Where, however, the testator does not agree to devise property, but the prospective devisee merely promises that if it is devised to him he will hold in trust for or reconvey to another, it is difficult to spell out any agreement between the two.[55] The only consideration for the intended devisee's promise is the devolution of the property, which does not take place until testator is dead, and, at that time, there can be no mutual assent.[56]

In a minority of the jurisdictions, in the absence of actual fraud, the courts have relied on the Statute of Frauds[57] or the Statute of Wills[58] as affording grounds for denying the enforcement of the parol promise by a legatee[59] or devisee[60] to apply the property for the benefit of a third party. However, the majority rule[61] is well established that neither the Statute of Frauds nor the Statute of Wills may be relied upon by a devisee or legatee who refuses to perform his oral promise to apply the property devised or bequeathed for the benefit of a third person.[62] To promote justice and prevent wrong the court will impose a constructive trust in order to compel the legatee to dispose of his gift in accordance with equity and good conscience.[63] This rule is well expressed by the court in the majority opinion of *Amherst College v. Ritch*,[64] where it was said:

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[54]See Evans v. Moore, 247 Ill. 60, 93 N.E. 118 (1910).
[55]See O'Neil v. Ross, 98 Cal. App. 306, 277 Pac. 123 (1929).
[56]*But cf.* Seaver v. Ransom, 224 N.Y. 233, 120 N.E. 639 (1918).
[57]Evans v. Moore, 247 Ill. 60, 93 N.E. 118 (1910).
[58]See Moore v. Campbell, 102 Ala. 445, 14 So. 780 (1893).
[59]*Ibid.*
[60]Evans v. Moore, 247 Ill. 60, 93 N.E. 118 (1910).
[61]For a collection of cases see Annot., 155 A.L.R. 106, 115 (1945).
[62]See, *e.g.*, Powell v. Yearance, 73 N.J. Eq. 117, 67 Atl. 892 (Ch. 1907).
[63]See, *e.g.*, Teuscher v. Gragg, 136 Okla. 129, 276 Pac. 753 (1929).
[64]151 N.Y. 282, 45 N.E. 876 (1897).

> The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect, by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee ex maleficio, to turn over the gift to them. The law, not the will, fastens the trust upon the fund, by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of wills nor the statute of frauds applies, because the will takes effect as written and proved; but, to promote justice and prevent wrong, the courts compel the legatee to dispose of his gift in accordance with equity and good conscience.[65]

4. *Character and Sufficiency of Evidence*

Emphasis should be laid on the proof which the court requires sufficient to establish a constructive trust in favor of the intended beneficiary. The general rule is that a trust in an absolute devise or legacy may be established by parol evidence of contemporaneous[66] or subsequent declarations[67] of either the testator or the legatee or devisee as to the legacy or devise being made for the benefit of a third person.[68] The proof must be "clear and convincing"[69] and must be received with extreme caution.[70] "So reluctant are the courts to ingraft a trust by parol on the legal title to real estate, or to enforce an alleged parol trust in personal property, that there is perhaps no better-established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence."[71] Constructive trusts have been established on the basis of the testimony of only one witness,[72] or have been denied although there were several who testified on behalf of those seeking to establish the trust.[73] The courts will decree relief only where the proof is sufficiently strong and are reluctant to interfere if there is any

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[65] *Id.* at 887.

[66] See, *e.g.*, Collar v. Mills, 190 Okla. 481, 125 P.2d 197 (1947).

[67] See, *e.g.*, Brunson v. Gladish, 174 Tenn. 309, 125 S.W.2d 144 (1939).

[68] *But see* Sprinkle v. Hayworth, 26 Gratt. 384 (Va. 1875), where the court relied upon the parol evidence rule as precluding the admission of evidence tending to show a promise by a devisee or legatee to apply the property for the benefit of another.

[69] Aumack v. Jackson, 79 N.J. Eq. 599, 82 Atl. 896 (Ct. Err. & App. 1912).

[70] Brock v. Brock, 90 Ala. 86, 8 So. 11 (1890).

[71] 54 AM. JUR. *Trusts* § 620 (1957).

[72] Socher's Appeal, 104 Pa. 609 (1884). See also Grant v. Bradstreet, 87 Me. 583, 33 Atl. 165 (1895) where the testimony of one witness, although denied by the defendant was held sufficient when corroborated indirectly by others.

[73] Tillar v. Henry, 75 Ark. 446, 88 S.W. 573 (1905).

doubt or ambiguity in the evidence to establish the trust.[74] This rule, requiring an extraordinary degree or certainty of proof in this class of cases has been applied or recognized in practically all jurisdictions with a wide variety of statement regarding the kind of testimony essential to establish the trust.[75]

III. In Mississippi

A. General Background

The Mississippi Supreme Court has had numerous opportunities in the past to consider constructive trusts. In *Jackson v. Jefferson*[76] Anderson, J., citing Pomeroy's *Equity Jurisprudence*, remarked: "It is a well-settled doctrine of equity that a constructive trust arises where one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another entitled thereto . . . ."[77] The court adopted the definition of a constructive trust set forth in the *Restatement of Trusts*[78] in the case of *Pitchford v. Howard*[79] when Judge Smith wrote: "A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property."[80]

1. *Nature of the Promise*

The Mississippi case of *Ragsdale v. Ragsdale*[81] is the first case in the state where the court considered the imposition of a constructive trust based upon the breach of a parol promise by a devisee to a testator to convey property to another. In the *Ragsdale* case, the testator executed a will devising all of his property to one of his sons. When he was in his last illness he caused a codicil to his will to be prepared, by which one-half of his estate was devised to another son. Wishing to execute this codicil, testator sent the sole devisee under the existing will to bring his lawyer for that purpose. Being unable to find the

[74]Gaither v. Gaither, 3 Md. Ch. 158 (Ch. 1851).

[75]For a collection of cases by jurisdiction, together with parenthetical statements as to the nature of the proof required, see Annot., 23 A.L.R. 1500, 1502 (1923).

[76]171 Miss. 774, 158 So. 486 (1935).

[77]*Id.* at 782, 158 So. at 487.

[78]Restatement (Second), Trusts § 1, comment *e* (1959); *accord*, 4 Scott, Trusts, § 462 (2d ed. 1956); Restatement, Restitution § 160 (1937).

[79]208 Miss. 567, 45 So. 2d 142 (1950).

[80]*Id.* at 583, 45 So. 2d 147.

[81]68 Miss. 92, 8 So. 315 (1890).

lawyer, the devisee promised his father that he would carry out his wishes, expressed in the unexecuted codicil and convey half the property to his brother. In holding that the devisee took the property as trustee to the extent of the devise intended to be made in the unexecuted codicil, the court added the following caveat:

> We would not be understood as sanctioning the doctrine that an enforceable trust will arise from the mere breach of an oral promise, however solemn, to hold land in trust . . . . A merely oral promise, and its subsequent breach, however disappointing and harmful, and though ever so reprehensible in morals, is not of itself enough to cause a court of chancery to declare a trust.[82]

The rule set forth in *Ragsdale* was partially modified by the court in *Benbrook v. Yancy*.[83] In this case the testator, several years prior to his death in 1906, determined to bequeath his property to the children of his deceased brother. As one of these children was of unsound mind, he decided to give her portion of the property to her children, the complainants in this cause. He therefore bequeathed all his property to defendant, his niece, who was one of the children of his deceased brother, stating that she understood what he wanted done and would carry out his wishes. The evidence showed that the defendant niece understood testator's wishes, and agreed to divide the property in accordance therewith, and that had the testator not so understood the matter, the will in question would not have been made. The complainants filed a bill praying that defendant be held to be a trustee holding the legal title of said property for the benefit of said children of testator's deceased brother and for complainants and for a sale thereof for a division. From a decree dismissing the bill this appeal was taken. Defendant argued, *inter alia*, that at most she was guilty only of the breach of an oral promise to hold the property in trust, and that from the breach of an oral promise no enforceable trust will arise, citing the above quoted section from *Ragsdale v. Ragsdale*.[84] In reversing the chancellor's dismissal of the bill and remanding the cause for a trial de novo, the court said:

> [T]he evidence shows much more than the mere breach of an oral promise on the part of appellee. As hereinbefore set out, the conduct of appellee was "influential in producing the result;" that is the making of the will, "but for which such result would not have occurred." It is true that in *Ragsdale v. Ragsdale, supra*, appellant was active in preventing a testator from making an intended provision for another, promising to make such provision himself. But the court there held that "intercepting a

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[82] *Id.* at 98, 8 So. at 316.

[83] 96 Miss. 536, 51 So. 461 (1910).

[84] 68 Miss. 92, 8 So. 315 (1890).

> bounty intended for another, and diverting it to one's self, is held to be a fraud, from which a trust arises by operation of law, and not within the statute of frauds or wills, but expressly excepted."[85]

2. *Fraud*

As early as 1890 in Mississippi the supreme court held: "Intercepting a bounty intended for another, and diverting it to one's self, is held to be a fraud from which a trust arises by operation of law, and not within the statute of frauds or wills, but expressly excepted."[86] In the *Ragsdale* case, however, the application of this doctrine was specifically limited to situations where the conduct of the defendant was influential in ". . . preventing the testator from making an intended provision by his will for another, and where but for such intervention the intended provision would have been made . . . ."[87]

In 1904 the Mississippi court cited *Ragsdale* but refused to apply the doctrine developed therein, saying: "Under the authorities, not only must there be *actual* fraud on the part of the party sought to be held as trustee, but there must be clear and convincing proof of this fraud."[88] (Emphasis added.)

The requirement of *actual* fraud was dispensed with by the court in *Benbrook v. Yancy*[89] in which the opinion of the Maine court in *Gilpatrick v. Glidden*[90] was extensively quoted and relied upon:

> In order to come within this rule, it is not necessary for a party to *actively* intervene. In the language of the court in *Gilpatrick v. Glidden* . . . : "If either before or after the making of the will the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will and that he relies upon the devisee to carry it into effect, and the latter, by any words or acts calculated to, and which he knows do in fact, cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement, equity will decree a trust, and convert the devisee into a trustee, *whether, when he gave his assent, he intended a fraud or not*; the final refusal having the effect of consummating the fraud."[91] (Emphasis added.)

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[85]Benbrook v. Yancy, 96 Miss. 536, 543, 51 So. 461, 462 (1910).

[86]Ragsdale v. Ragsdale, 68 Miss. 92, 8 So. 315 (1890).

[87]*Id.* at 97, 8 So. at 316.

[88]Moore v. Crump, 84 Miss. 612, 620, 37 So. 109, 110 (1904).

[89]96 Miss. 536, 51 So. 461 (1910).

[90]81 Me. 151, 16 Atl. 464 (1888).

[91]Benbrook v. Yancy, 96 Miss. 535, 543, 51 So. 461, 462 (1910).

3. *Effect of Statute of Wills and Frauds*

In *Ragsdale v. Ragsdale,*[92] as noted previously, the court said: "Intercepting a bounty intended for another, and diverting it to one's self, is held to be a fraud from which a trust arises by operation of law, and *not within the statute of frauds or wills, but expressly excepted.*"[93] (Emphasis added.) This pronouncement has been referred to with favor by the Mississippi court in subsequent cases.[94]

The Mississippi Statute of Frauds requires a writing where there is a declaration or creation of a trust in land, whether by deed or by will.[95] This statute stipulates, however, that the requirement of writing is to have no effect on trusts of land that arise or result by implication of law.[96] The statute is confined to express trusts[97] and has no application to resulting trusts[98] nor to constructive trusts.[99] Under the original English Statute of Frauds[100] it is provided in section 8 that trusts "which shall arise or result by implication or construction of law" are to be of the like force and effect as they would have been had there been no statute. Even without such a provision the statute would no doubt have been construed to except such trusts.[101] From the very nature of such trusts, a requirement that they be in writing would have resulted in legislating them right out of existence.[102]

4. *Character and Sufficiency of the Evidence*

As early as 1841 the Chancellor of the Superior Court of Chancery of Mississippi, in the case of *Mercer v. Stark*[103] said: "It is necessary that the parol declarations of a trust should be clear and unambiguous, before the court can change the absolute nature of a conveyance, and decree the execution of a trust, not expressed in the deed."[104] In 1894 the court said in *Logan v. Johnson*:[105] "Where it is necessary to prove by parol the existence of a trust, the evidence must be clear, strong, unequivocal, unmistakable, and must establish the fact of the payment by the benefici-

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[92]68 Miss. 92, 8 So. 315 (1890).
[93]*Id.* at 98, 8 So. at 316.
[94]See, *e.g.*, Moore v. Crump, 84 Miss. 612, 620, 37 So. 109, 110 (1904).
[95]MISS. CODE ANN. § 269 (1956).
[96]*Ibid.*
[97]Adcock v. Merchants & Mfrs. Bank, 207 Miss. 448, 42 So. 2d 427 (1949).
[98]Triplett v. Bridgeforth, 205 Miss. 328, 38 So. 2d 756 (1949).
[99]Adcock v. Merchants & Mfrs. Bank, 207 Miss. 448, 42 So. 2d 427 (1949).
[100]29 Car. II, c. 3 (1676).
[101]SCOTT, TRUSTS § 406 (2d ed. 1956).
[102]BOGERT, TRUSTS AND TRUSTEES § 452 (1953).
[103]Sm. & M. Ch. 479 (Miss. Ch. 1841).
[104]*Id.* at 488.
[105]72 Miss. 185, 16 So. 231 (1894).

ary beyond a reasonable doubt."[106] *Moore v. Crump*[107] set up the requirement that "not only must there be actual fraud on the part of the party sought to be held as trustee, but there must be clear and convincing proof of that fraud."[108] In the *Benbrook* case, however, the court adopted the majority view that "in order to come within this rule it is not necessary for a party to actively intervene."[109] Since, therefore, the *Benbrook* decision was subsequent to that of *Moore v. Crump*,[110] it would seem that in 1910, in Mississippi, the plaintiff was required to show by this "clear and convincing evidence" only the agreement by the deceased and the defendant, and the defendant's subsequent refusal to perform. In *Saulsberry v. Saulsberry*[111] the court thus summarized its position as to the character of the evidence it deems sufficient to raise a constructive trust:

> This court has held in numerous cases that proof of facts relied on to establish a constructive or resulting trust in a case of this kind must be clear and convincing . . . and the general rule is that oral evidence offered to prove such facts must be received with caution. Indeed, "so reluctant are the courts to ingraft a trust by parol on the legal title to real estate, or to enforce an alleged parol trust in personal property, that there is perhaps no better-established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence."[112]

B. *Stovall v. Stovall*

William G. Stovall, a resident of Chickasaw County, died intestate on September 7, 1950, leaving his widow, Mrs. Katherine Fisher Stovall, and children, Mrs. Linda Stovall Parsons and William G. Stovall, Jr., as his sole and only legal heirs, and leaving a personal gross estate of approximately $25,000, exclusive of certain life insurance policies. Decedent had three policies of life insurance for the face amount of $22,000. His two children were made the beneficiaries of two of the policies and, the third, with a face value of $10,000, was payable to his estate. This third policy the decedent pledged to the Bank of New Albany to secure a loan. After Mr. Stovall's death, and the payment of the loan from the funds provided by the policy, the net proceeds of the policy remaining amounted to $8,376.70. Mrs. Stovall qualified as administratrix of her deceased husband's estate, and, having collected the net proceeds of the pledged policy, she deposited the same with other funds of the estate.

[106] *Id.* at 187, 16 So. at 232, quoting 2 POM. EQ. § 1040 (1881).
[107] 84 Miss. 612, 37 So. 109 (1904).
[108] *Id.* at 620, 37 So. at 110.
[109] Benbrook v. Yancy, 96 Miss. 536, 543, 51 So. 461, 462 (1910).
[110] 84 Miss. 612, 37 So. 109 (1904).
[111] 232 Miss. 820, 100 So. 2d 593 (1958).
[112] *Id.* at 837, 100 So. 2d at 600, quoting 54 AM. JUR. *Trusts* § 620 (1957).

When she filed her final account and petition for approval and allowance thereof, she alleged that the proceeds of the $10,000 life insurance policy constituted no part of the decedent's estate but belonged to her by virtue, *inter alia*, of a parol constructive trust created for her benefit by agreements and understanding entered into between deceased and his two children. The children denied this allegation and upon the issue thus raised there was a hearing by the court before final action on the administratrix' final account. After hearing the evidence the chancellor rendered an interlocutory degree that the evidence was sufficient to establish a parol constructive trust for the benefit of the widow entitling her to the entire proceeds of the insurance. From this interlocutory decree the Mississippi Supreme Court granted an appeal.

In an opinion[113] reversing the lower court's decree for the widow, the court reviewed the conflicting evidence as to the nature and extent of the agreement between the father and his children. This the court summarized by saying that "the proof here shows, according to the evidence for the appellee . . . that the father said to his children that the proceeds of this insurance was to go to his wife and that such was the understanding between them."[114] After a general summary of the various doctrines of constructive trust applicable in this situation, relying strongly on *Ragsdale v. Ragsdale*,[115] *Moore v. Crump*,[116] and *Benbrook v. Yancy*,[117] the court stated:

> [I]n order for the appellee to maintain her claim of a constructive trust, the burden of proof was upon her to show by clear and convincing evidence the existence of the essential elements thereof. She was required, therefore, to show by this high degree of proof that her husband intended for her to have the insurance, that his children either expressly or by silent acquiescence promised him to carry out such intention, *and that he relied upon them to do so, and acting upon such reliance* he refrained from changing the beneficiary to his wife or assigning the policy to her, or bequeathing the proceeds to her by will or otherwise providing by writing for her to receive the proceeds of insurance. We think that the evidence falls short of meeting the high degree of proof which was required in order to establish these essentials of the trust.[118] (Emphasis added.)

Thus it would seem that, despite a vigorous dissent[119] by Judge Ethridge in which Chief Justice McGehee concurred, the requirement of reliance and a change of position as a result of that reliance has been

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[113]Stovall v. Stovall, 218 Miss. 364, 67 So. 2d 391 (1953).
[114]*Id.* at 378, 67 So. 2d at 397.
[115]68 Miss. 92, 8 So. 315 (1890).
[116]84 Miss. 612, 37 So. 109 (1904).
[117]96 Miss. 536, 51 So. 461 (1910).
[118]Stovall v. Stovall, 218 Miss. 364, 376-77, 67 So. 2d 391, 397 (1953).
[119]*Id.* at 381, 67 So. 2d at 399.

added by the Mississippi court as an element which must be proved by "clear and convincing" evidence by one seeking to establish a constructive trust in his favor.

In both the *Benbrook*[120] and the *Ragsdale*[121] cases there was some general language concerning the settlor's reliance on the oral promise, but, since that factor already existed in both cases, discussions of it were not necessary to the opinions. In neither of the cases was reliance said to be an element necessary of proof before the courts would impose a constructive trust.

The *Restatement of Trusts,* in enumerating the instances in which a constructive trust will arise where the owner of an interest in land transfers it absolutely to another to hold in trust for the transferor[122] or for a third person,[123] does not include the element of reliance or a change of position. The *Restatement* does state, however, that where a testator devises property to a person "in *reliance* upon his agreement" to hold the property in trust, or where a person dies intestate "in *reliance* upon an agreement" by his heir or next of kin to hold in trust, the property is held upon a constructive trust for the person indicated by the testator.[124] This statement, however, does not mention the necessity of a change of position, nor does it illustrate just what is meant by the term "reliance." Perhaps Professor Scott has best handled the problem of "reliance" in this statement:

> In some of the cases it is said that a mere promise is insufficient; but apparently all that this means is that it must be shown that *B* [the devisee], by his promise or by his silent acquiescence, has induced *A* [the testator] to devise the property to him, or, in other words, that *A* would not have devised the property to *B* if he had not been led to expect, as a result of *B*'s promise or acquiescence, that *B* would carry out *A*'s intention, and that otherwise *A* would have devised the property to *C* [the intended devisee] or made some other disposition in *C*'s favor.[125]

This summary seems to be borne out by a number of cases from a majority of the jurisdictions. In *Russell v. Jackson*[126] a testator re-

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[120]96 Miss. 536, 51 So. 461 (1910).

[121]68 Miss. 612, 37 So. 109 (1904).

[122]RESTATEMENT (SECOND), TRUSTS § 44(1) (1959). This section is expressly adopted by the Mississippi court in Pitchford v. Howard, 208 Miss. 567, 583, 45 So. 2d 142, 147 (1950), and Adcock v. Merchants & Mfrs. Bank, 207 Miss. 448, 458, 42 So. 2d 427, 431 (1949).

[123]RESTATEMENT (SECOND), TRUSTS § 45(1) (1959). This section is expressly adopted by the court in the Mississippi case, Coleman v. Kierbow, 212 Miss. 541, 552, 54 So. 2d 915, 919 (1951).

[124]RESTATEMENT, (SECOND), TRUSTS § 55 (1959).

[125]1 SCOTT, TRUSTS § 55.1 (2d ed. 1956).

[126]10 Hare 204, 68 Eng. Rep. 900 (Ch. 1852).

quested his solicitor to draft a will for him, expressing to him his desire to leave all of his property for the purpose of establishing a school for the education of children in socialism. When the solicitor expressed his doubts as to the legality of such a disposition of testator's property by will, testator, in the presence of the two eventual beneficiaries of his will, said, "I will leave the property to the two Jacksons: they know my wishes, and I am satisfied they will carry out my intentions." Testator's next of kin, in an action to have the will declared void, alleged that the gift to the defendants was made upon a secret and illegal trust. In finding that the defendants held the devise to them in trust, the court said of testator's above mentioned statement:

> Does not that amount to an undertaking—a promise on their part to carry out the intentions which the testator had expressed? The true test to the answer to the question is this: would the testator have left the property to the Defendants if the Defendants had stated in answer to that question that they would not carry out the disposition which the testator intended to effect through the medium of the trust, which he had declared on the instructions? No one can doubt that, if these Defendants had stated that they would not carry out the intentions of this testator, this disposition in their favor would not have been found in this will. Then, if the disposition in their favor is made, and made only for the purpose of carrying out the testator's intentions, and made upon their assent, and undertaking that those intentions shall be carried out, surely it must be considered as an undertaking by a devisee that he will carry out the intentions of his testator.[127]

To the same effect is the New York decision in *Matter of O'Hara*.[128] In this case testatrix devised the bulk of her estate to three persons, who were her lawyer, Judge McCue, her doctor, Dr. Dudley, and her priest, Father McGuire. Probate was resisted by testatrix' next of kin and, at the subsequent hearing, a letter of instruction, addressed to the residuary legatees and contemporaneous with the will, was produced in evidence. This letter demonstrated that the residuary clause was not intended by the testatrix to bestow any beneficial interest on the legatees, but that her real intention was to devote it to certain charitable purposes. This intention could only be accomplished through an absolute devise to individuals in whose honorable action she could confide. Although there was evidence that only Judge McCue knew of her intentions and that he had made no promise to obtain the bequest or devise, and practiced no fraud, the court found that the beneficiaries of testatrix' residual estate held as constructive trustees, stating: "For it is not possible to doubt that if the legatees had said—we will not promise; we will do as we

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[127] *Id.* at 211-12, 68 Eng. Rep. at 923.

[128] 95 N.Y. 403 (1884).

please; we will not be even honorably bound not to take this money for ourselves—the absolute bequest would never have been made.[129]

It would seem therefore that the test applied by most courts when determining the sufficiency of the testator's reliance on his devisee to carry out his intentions is—would he have made some other disposition of his property if he had known that his wishes were not going to be fulfilled? True, this puts the onus of responsibility on the devisee or legatee to speak up if he does not intend to perform, but, as shown above, the courts have held that silent acquiescence is equivalent to a promise.[130] This seems to be the approach taken by the court in *In re Boyes*[131] where it is stated that "it is to be *presumed* that if it had not been for such promise the testator would not have made or would have revoked the gift."[132]

IV. Conclusion

In most jurisdictions the courts have imposed constructive trusts, based upon the breach of a parol promise by an heir or beneficiary to a testator to hold property for another, when it has been shown by "clear and convincing" evidence (1) that the testator intended that the devisee hold for another and (2) that the devisee promised to carry out such intention. To the above, the Mississippi court, in *Stovall v. Stovall*[133] added the requirement of reliance by the testator on the devisee's performance of his promise and a change of position as a result of that reliance. It is submitted that the application of this requirement in the manner in which it was applied in *Stovall* will result in an impairment of the doctrine of constructive trust as a remedy for unjust enrichment in Mississippi. Surely the only type of proof one may present to show clearly and convincingly that the testator died in *reliance* on the devisee's promise to carry out his intentions is that the testator made no other disposition of the property in question. It is submitted that upon a showing by the constructive *cestui que trust* that there was an agreement between the testator and the devisee, and that, subsequent to this agreement, the testator made no attempt to prevent the devisee from acquiring the title to the property, the courts should interpret the testator's failure to make or change his will as reliance on the devisee's promise and impose a constructive trust.

Paul Tudor Jones, V

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[129] *Id.* at 412.

[130] Winder v. Scholey, 83 Ohio St. 204, 93 N.E. 1098 (1910).

[131] [1883] 26 Ch. Div. 531.

[132] *Id.* at 535. See also Barron v. Stuart, 136 Ark. 481, 207 S.W. 22 (1918); Ransdal v. Moore, 153 Ind. 393, 53 N.E. 771 (1899); Gemmel v. Fletcher, 46 Kan. 577, 92 Pac. 713 (1907).

[133] 218 Miss. 364, 67 So. 2d 391 (1953).

CONFLICT BETWEEN STATE AND FEDERAL COMPENSATION LAW IN ADMIRALTY: FROM JENSEN TO CALBECK AND BEYOND

I. Origins of the State-Federal Conflict

In England, the jurisdiction of the admiralty courts had been the subject of great jealousy among the early common law courts. As a result, the power of admiralty was greatly curtailed and by the onset of the American Revolution had ceased to be a very important part of English jurisprudence.[1] The framers of the American Constitution granted all judicial power over admiralty to the courts of the United States.[2] No admiralty jurisdiction was given concurrently to the states by the language of the Constitution.

Prior to the adoption of the Constitution, each state had enforced its own rules of admiralty and had not always followed the admiralty rules in force in the mother country.[3] In dispensing the law of admiralty, the federal courts did not follow the laws of England,[4] but followed any state, federal, English, or continental rules.[5] However, while our forefathers were able to prevent competition between admiralty courts and courts of law and equity by placing them all in the same court, they were completely unsuccessful in preventing competition between state and federal courts.[6] In the first Judiciary Act of 1789,[7] Congress limited the jurisdiction of the federal court by stating that the courts of the United States had exclusive jurisdiction in admiralty, "saving to suitors the common law remedy where the common law is competent to give it."[8] The federal courts further limited their own power by permitting the states to pass legislation affecting or regulating admiralty where Congress had not acted,[9] so long as state action was of such a nature

[1]Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934); Bains v. The James & Catherine, 2 Fed. Cas. 410, 413 (No. 756) (C.C.D. Pa. 1832).

[2]U.S. Const. art. III, § 2.

[3]Bains v. The James & Catherine, 2 Fed. Cas. 410, 413 (No. 756) (C.C.D. Pa. 1832).

[4]Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934); Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 24-25 (1871); Waring v. Clark, 46 U.S. (5 How.) 441 (1846); Cunningham v. Hall, 6 Fed. Cas. 967 (No. 3481) (C.C.D. Mass. 1858); DeLovid v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

[5]Cunningham v. Hall, 6 Fed. Cas. 967 (No. 3481) (C.C.D. Mass. 1858).

[6]See, *e.g.*, The Steamer St. Lawrence, 66 U.S. (1 Black) 522 (1862).

[7]§ 9, 1 Stat. 74 (1789).

[8]*Ibid.*

[9]Manchester v. Massachusetts, 139 U.S. 240, 266 (1891); County of Mobile v. Kimball, 102 U.S. 691, 697 (1881); Cooley v. Board of Wardens, 19 U.S. (12 How.) 299, 316-17 (1851); United States v. New Bedford Bridge, 27 Fed. Cas. 91, 93-94 (No. 15867) (C.C.D. Mass. 1847); *cf.* Leisy v. Hardin, 135 U.S. 100 (1889); The General Smith, 17 U.S. (4 Wheat.) 438 (1819); Murry v. Chicago & N.W. Ry. 62 Fed. 24, 42-43 (N.D. Iowa 1894), *aff'd* 92 Fed. 868 (8th Cir. 1899).

that uniformity and harmony of the general admiralty law was not seriously disturbed.[10]

Congress is given the authority to implement any constitutional grant of power given the federal judiciary,[11] and also has the power to regulate all interstate and international commerce,[12] thereby, through implication, having the authority to regulate all matters of admiralty. All courts agree that any congressional action in the field of admiralty is exclusive and supersedes any conflicting action by a state legislature.[13] Congress first acted in this field in 1845 when admiralty jurisdiction of the federal courts was extended to the Great Lakes.[14] The courts held that this act was ineffective. The Supreme Court has never limited admiralty jurisdiction to the "ebb and flow of the tide" as the English, but had always considered any navigable waterway within the realm of admiralty.[15] Congress made few overt attempts to exercise direct control over maritime law thereafter, except in its efforts to regulate commerce. However, by the turn of the century Congress made several attempts to provide for compensation for those seamen or other maritime workers who were injured on navigable waters, and thereby beyond the jurisdiction of the state courts.

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[10]County of Mobile v. Kimball, 102 U.S. 691, 697 (1880); Cooley v. Board of Wardens, 19 U.S. (12 How.) 299, 321; Frame v. City of New York, 34 F. Supp. 194 (S.D.N.Y. 1940); Shore Fishery v. Board of Review, 127 N.J.L. 87, 21 A.2d 634, 638 (Sup. Ct. 1941).

[11]U.S. CONST. art. I, § 8.

[12]U.S. CONST. art. I, § 8; see Swanson v. Marra Bros., 328 U.S. 1, 5 (1946); Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 557 (1889); Gilman v. Philadelphia, 71 U.S. (3 Wall.) 713, 724-25 (1865); Lord v. Steamship Co., 102 U.S. 541, 544 (1880); Goodman v. United States, 113 F.2d 914, 917 (8th Cir. 1940); Scozzafava v. United States, 199 F. Supp. 43 (S.D.N.Y. 1961); Occidental Idem. Co. v. Industrial Acc. Comm., 24 Cal. 2d 310, 149 P.2d 841 (1944). *Compare* U.S. CONST. art. 1, § 8, cl. 18, the implementing clause giving Congress the authority necessary to carry out the powers given the government *with* U.S. CONST. art 3, § 2.

[13]State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204, 216 (1870); The Streamer St. Lawrence, 66 U.S. (1 Black) 522, 526-27 (1862); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1924); Guerrido v. Alcoa S.S. Co., 234 F.2d 349 (1st Cir. 1956); United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 837 (S.D. Cal. 1958); Stoffel v. W. J. McCahan Sugar Refining & Molasses Co., 35 F.2d 602 (E.D. Pa. 1929); Stockton v. Baltimore & N.Y. R.R., 32 Fed. 9 (C.C.D. N.J. 1887); *In re* Cassaretakis, 263 App. Div. 773, 31 N.Y.S.2d 183 (Sup. Ct. 1941); Bergen v. International Elevating Co., 262 App. Div. 654, 30 N.Y.S.2d 721, 722 (Sup. Ct. 1941); Otis v. State, 176 Misc. 389, 27 N.Y.S.2d 527 (Ct. Cl. 1941). See also Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 507 (1888).

[14]Ch. 20, 5 Stat. 726 (1845).

[15]The Eagle, 75 U.S. (8 Wall.) 15, 25 (1868); The Propeller Genessee Chief, 53 U.S. (12 How.) 443 (1851).

II. Compensation before Congressional Action

Prior to the federally enacted compensation statutes, there was no recovery in admiralty for death that occurred on the "high seas,"[16] but an action could be maintained for maintenance and cure.[17] The basis for not allowing an action for wrongful death was found in the common law where there could be no such recovery in the absence of statute.[18] No nation had allowed an action for wrongful death in admiralty in the absence of such a statute.[19]

Before the passage of compensation statutes, in an action for maintenance and cure, the injured seaman could sue his master to recover wages and medical care until the end of his voyage or the termination of his contract.[20] An action would lie if the injury was occasioned by the negligence of the claimant or by any other party;[21] and the claimant could maintain an action in rem, creating a lien against the vessel, or proceed against the owner.[22] Originally, injury which occurred while on offshore duty or by the seaman's own willful wrongdoing gave him no rights against the vessel or its owners,[23] but in *Warren v. United States* the Supreme Court allowed a seaman to maintain a recovery for an injury he received while on shore in a fracas in a Neapolitan bistro.[24] The Court seemed to create a sort of "personal comfort doctrine" declaring that seamen have a need for relaxation and shore leave to perform efficiently on board ship.[25] If the injury were caused by the unseaworthiness of the ship or her tackle[26] or by a failure to supply medical attention when needed, in spite of the good faith of the employer in believing the patient is malingering, the seaman was entitled to compensatory damages.[27]

III. Congressional Action for Compensation and the *Jensen* Case

Maintenance and cure allowed a measure of compensation for seamen injured during the course of their employment or while

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[16]Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 555 (1889); The Harrisburg, 119 U.S. 199, 213 (1886).

[17]See generally 1 Benedict, Admiralty § 83 (Knath ed. 1940).

[18]The Harrisburg, 119 U.S. 199, 213 (1886).

[19]*Ibid.*

[20]Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938).

[21]See 1 Benedict, Admiralty § 83 (Knath ed. 1940) [hereinafter cited as 1 Benedict].

[22]The Osceola, 189 U.S. 158 (1903).

[23]1 Benedict § 83.

[24]340 U.S. 523 (1951).

[25]*Id.* at 530.

[26]1 Benedict § 83.

[27]The Osceola, 189 U.S. 158 (1903).

their employment contract was in force, but no allowance for compensation was made for maritime workers such as stevedores or longshoremen. With the advent of compensation statutes, Congress began to take measures to correct these inequities. In the *Osceola* the Supreme Court held that the right of a seaman to maintenance and cure was an implied part of any maritime contract.[28] Still, the harbor worker who was injured during the course of his employment had to sue his employer and overcome such defenses as assumption of risk, contributory negligence, and the fellow servant doctrine.[29]

After 1911, states began to pass workmen's compensation acts which were assumed to cover maritime workers within their boundaries. State courts considered that their workmen's compensation statutes stood in the place of the common law. Therefore, under the "savings to suitors" clause of the Judiciary Act of 1789[30] allowing suitors to bring an action at common law where it was competent to entertain it, the injured harbor worker could maintain an action under the state workmen's compensation act.[31]

However, such thoughts of coverage for maritime workers were short-lived. In 1917, the Supreme Court decided the *Jensen* case.[32] A longshoreman was killed on a ship's gangway while driving a truck used to handle cargo between the ship and the pier. The New York Court affirmed an award to his widow under the New York Workmen's Compensation Act, and certiorari was granted from that court.[33] The Supreme Court held that to allow recovery under the New York law would disrupt the harmony and uniformity of the maritime law.[34] The Court stated that:

> Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, "saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved from suitors in the grant of exclusive jurisdiction.[35]

The *Jensen* case marks the turning point of admiralty compensation. No case was ever received with wider disfavor, and Congress immediately began to take measures to correct this inequity. Within four months

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[28]189 U.S. 158 (1903).
[29]See 1 BENEDICT § 27.
[30]1 Stat. 74 (1789).
[31]Lindstrom v. Mutual S.S. Co., 132 Minn. 328, 156 N.W. 669 (1916).
[32]Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).
[33]*Id.* at 207-11.
[34]*Id.* at 217.
[35]*Id.* at 218.

after the rendition of this decision by the Supreme Court, Congress added to the "savings to suitors" clause the words: And saving to claimants the rights and remedies under the Workmens Compensation Law of any State.[36] The act made no exception for seamen.

The act was tested within a very short time. A bargeman fell into the Hudson River and drowned. His widow brought an action under the New York Workmen's Compensation Law, relying on the 1917 amendment to the Judiciary Act, and the state court permitted recovery.[37] The Supreme Court held that the amendment would be destructive to the uniformity and harmony of the admiralty law,[38] and further held that Congress had attempted to change the admiralty jurisdiction which it was given no authority to do under the Constitution.[39]

After these two cases, Congress began steps to ease the difficulty of tort recovery in admiralty by passing the Jones Act,[40] the Death on the High Seas Act,[41] and the Longshoremens and Harbor Workers Act.[42]

IV. The Death on the High Seas Act.

The Death on the High Seas Act[43] was passed by Congress to permit recovery for any death beyond one maritime league from the shore of any state caused by wrongful act, neglect, or default. The statute corrected the inequity of American admiralty which would not permit an action for wrongful death occurring at sea.[44] The new statute did not limit recovery to the courts of admiralty, but allowed an action in any court competent to give a remedy.[45] Nor did the statute require that the death take place on the high seas, but only that the act which results in the death occur there.[46]

The Death on the High Seas Act allows no recovery on water within the boundaries of a state,[47] and such recovery could not be had by seamen until the passage of the Jones Act[48] or by land-based maritime workers until the passage of the Longshoremens and Harbor Workers

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[36]40 Stat. 395 (1917).

[37]Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 155-56 (1920).

[38]*Id.* at 159.

[39]*Id.* at 164.

[40]41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[41]Stat. 537 (1920), 46 U.S.C. § 761 (1958).

[42]44 Stat. 1424 (1927), 33 U.S.C. § 901-50 (1957).

[43]41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

[44]Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 555 (1889); The Harrisburg, 119 U.S. 199, 213 (1886).

[45]Elliott v. Steinfeldt, 254 App. Div. 739, 4 N.Y.S.2d 9 (Sup. Ct. 1938).

[46]The Chiswick, 231 Fed. 452 (5th Cir. 1916). *Contra,* Ryley v. Philadelphia & R. Ry. 173 Fed. 839, 841 (S.D.N.Y. 1909).

[47]41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

[48]41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

Act.[49] The act also specifically excluded the Great Lakes and Panama Canal Zone from its coverage.[50]

However, the Supreme Court has allowed recovery in personam under state wrongful death acts where death occurred on the waters within the state,[51] contrary to the rule espoused formerly where no recovery was allowed under state statutes for wrongful death on navigable waters.[52]

While not a compensation act, since the basis for recovery under the Death on the High Seas Act, as all other wrongful death statutes, is wrongdoing, the act presents an important remedy for the seaman, since it presents an election with the Jones Act in case of wrongful death.[53] It has been suggested that the purpose of Congress in enacting the Jones Act was to permit recovery for the death of seamen killed within one maritime league of the shore.[54] However, this view has not generally been accepted, and wrongful death actions are generally brought under the Jones Act without challenge to the jurisdiction.[55]

It has been held that while the same parties may not maintain an action under the Death on the High Seas Act and the Jones Act, different parties who have a claim accruing from the same cause of action may maintain separate suits; one party using one act while the second party proceeds under the other.[56]

V. The Jones Act

The Jones Act[57] represents the first successful attempt of Congress to enact a type of compensation act for seamen allowing benefits beyond the limitations of maintenance and cure.[58] By this act, the seaman is given the same rights against his employer as is extended the railroad employee by the Federal Employers' Liability Act.[59] It allows the injured seaman to elect between an action for damages at law with a right of trial by jury, or an action in admiralty. The same election exists for

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[49]44 Stat. 1424 (1927), 33 U.S.C. § 901-50 (1958).

[50]41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

[51]Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921). See also Baer, Admiralty Law of the Supreme Court § 1-19 (1963) [hereinafter cited as Baer].

[52]Butler v. Boston & Savannah S.S. Co., 130 U.S. 527, 557 (1889).

[53]See 1 Benedict § 142.

[54]*In re* Rademaker's Estate, 166 Misc. 201, 2 N.Y.S.2d 309, 315 (Surr. Ct. 1938); 1 Benedict § 142.

[55]1 Benedict § 142 n.15.

[56]The Four Sisters, 75 F. Supp. 399, 400-01 (D. Mass. 1947).

[57]41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[58]See generally Hanna, Federal Remedies for Employee Injuries 95-96 (1955) [hereinafter cited as Hanna].

[59]35 Stat. 65-66 (1908), 45 U.S.C. §§ 51-60 (1958).

the personal representative of a deceased seaman.[60] The Jones Act does not supersede the admiralty remedy of maintenance and cure but supplements it.[61] An action under the Jones Act and for maintenance and cure is independent and cumulative.[62] Negligence is the gravamen of a Jones Act suit, and the injury must occur on navigable waters.[63]

The act does not remove the proceedings from the principles of admiralty.[64] The act is interpreted liberally so as to enlarge the admiralty protection of its wards, and there are no common law defenses available.[65]

The Jones Act is elective where the Death on the High Seas Act may also be invoked in cases for wrongful death, as previously described. It is not elective with the Longshoremen's and Harbor Workers' Act. Prior to passage of the Longshoremen's and Harbor Workers' Act, Congress considered passing a general maritime compensation act which would include all seamen, but the seamen seemed to prefer the present remedies under the Jones Act.[66]

The Jones Act was used by the Supreme Court to correct some of the inequities created by the *Jensen* case.[67] The Court held that any person performing a maritime act while on navigable waters was a seaman.[68] This raised some question of an election between the Jones Act and the Longshoremen's and Harbor Workers' Act for a land-based employee performing a maritime task aboard ship. The Longshoremen's Act is exclusive,[69] and this question is generally immaterial. But where a claim is denied under the Longshoremen's Act, the denial is not res judicata to a later proceeding based on the Jones Act.[70]

Under the Jones Act, a worker may proceed in personam[71] in ad-

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[60]41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

[61]Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942); Geistlinger v. International Mercantile Marine Co., 295 Fed. 176 (S.D.N.Y. 1924); Rowley v. Sierra S.S. Co., 48 F. Supp. 193 (N.D. Ohio 1942).

[62]Garrett v. Moore-McCormack, *supra* note 61, at 245.

[63]41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958); 1 BENEDICT § 25.

[64]Panama R.R. v. Johnson, 264 U.S. 375, 387 (1924); Lopoczyk v. Chester A. Poling, Inc., 152 F.2d 457 (2d Cir. 1945).

[65]Brown v. C. D. Mallory & Co., 122 F.2d 98 (3d Cir. 1941).

[66]See generally 1 BENEDICT § 27.

[67]Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[68]Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412-13 (1953); International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926); *cf.* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[69]44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

[70]Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 386 (6th Cir. 1953); HANNA 103-04.

[71]Plamals v. S.S. Pinar del Rio, 277 U.S. 151, 156 (1928). The action can be brought *in personam* only and may not be brought *in rem* against the ship. Rowley v. Sierra S.S. Co., 48 F. Supp. 193 (N.D. Ohio 1942). *Accord,* Samuels v. Munson S.S. Line, 63 F.2d 861, 862 (5th Cir. 1933).

miralty, or in law in either the state or federal courts.[72] When an action is brought in the state courts, these courts cannot apply their own substantive remedy but must follow the rules of admiralty.[73] This, of course, would preclude any recovery under the state workmen's compensation laws.[74] Following the *Jensen* doctrine, the courts have stated that to allow seamen to recover under the state acts would destroy the uniformity and harmony of the maritime law.[75]

Generally, the courts have not limited recovery under the Jones Act to actions accruing on navigable waters, but have extended coverage under the act to many who would seem to be included under other statutes. The courts have now permitted a seaman injured on land to recover if the the injury accrued while performing some duty for the ship.[76] This is in contrast to the former ruling that the Jones Act excludes any actions accruing on land, which must necessarily be covered by the state workmen's compensation law.[77] The courts have permitted recovery by employees of an offshore drilling rig,[78] a handyman who worked between a dredge and the shore,[79] a worker on a motorboat used to tow fishing vessels between scows,[80] and anyone who is in the "practical operation" of a ship.[81] By increasing the type of employees covered and permitting recovery for land-based injuries, it would appear that the courts have extended the Jones Act to include all persons engaged in actual navigation, no matter where they are working, and all persons engaged in any type of work on the sea. It is submitted that there is no longer recovery for any maritime worker under state workmen's compensation law even if injured on land, or any non-maritime worker injured at sea.

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[72]Messel v. Foundation Co., 274 U.S. 427 (1927); Colonna Shipyard v. Bland, 150 Va. 349, 143 S.E. 729 (1928); 1 BENEDICT § 25; HANNA 104.

[73]Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942); Shelton v. Seas Shipping Co., 75 F. Supp. 195 (E.D. Pa. 1947); Premeaux v. Socony-Vacuum Oil Co., 144 Tex. 558, 192 S.W.2d 138 (1946).

[74]Occidental Indem. Co. v. Industrial Acc. Comm., 24 Cal. 2d 310, 149 P.2d 841 (1944).

[75]Occidental Indem. Co. v. Industrial Acc. Comm., *supra* note 74; Westerberg v. Tidewater Associated Oil Co., 304 N.Y. 545, 110 N.E.2d 395 (1953); Otis v. State, 176 Misc. 389, 27 N.Y.S.2d 527 (Ct. Cl. 1941).

[76]O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943); Apperson v. Universal Services, Inc., 153 So. 2d 81 (La. Ct. App. 1963).

[77]Swanson v. Marra Bros., 328 U.S. 1, 7 (1946); Seifort v. Kearnburg Steamboat Co., 20 F. Supp. 542 (S.D.N.Y. 1937).

[78]Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

[79]Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957).

[80]Alaska Indus. Bd. v. Alaska Packers Ass'n., 186 F.2d 1015 (9th Cir. 1951).

[81]Curtiss Bay Towing Co. v. Dean, 174 Md. 498; 199 Atl. 521, 526 (1938).

VI. Compensation for Land-Based Maritime Employees

Prior to the *Jensen* decision,[82] the general assumption had been that land-based maritime employees, as longshoremen or stevedores, were covered by the state compensation.[83] Since the *Jensen* doctrine and the *Knickerbocker Ice Company* case[84] left these workers with no measure of recovery, the Supreme Court began to take steps to alleviate this inequity.

A. The "Maritime but Local" Doctrine before the Act

The Court in *Western Fuel Co. v. Garcia* decided that the widow of a stevedore killed while working in the hold of a vessel might recover under a state wrongful death statute because such action "is maritime and local in character and . . . will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law. . . ."[85] This decision became the predicate for later decisions which allowed recovery under state law for injured land-based maritime workers.

A later decision held that a longshoreman who received injuries while working on a pier could recover under a state compensation act, as the pier was not part of the admiralty jurisdiction but was an extension of land.[86]

A carpenter was included in the *Garcia* doctrine when he was killed on navigable waters while working under a contract to build a vessel.[87] The Court stated that a contract to build a ship was non-maritime in nature and was of purely local concern.[88] State courts took advantage of this "loop-hole" in the *Jensen* doctrine and permitted recovery under their laws for claimants who were in a doubtful area of admiralty jurisdiction.[89] The Supreme Court further implemented the doctrine by allowing recovery under the state act for a worker killed while diving to remove an obstruction to navigation.[90]

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[82]Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[83]Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372 (1915); Lindstrom v. Mutual S.S. Co., 132 Minn. 328, 156 N.W. 669 (1916). *But see*, Schuede v. Zenith S.S. Co., 216 Fed. 566, 571 (N.D. Ohio 1914).

[84]Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).

[85]Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

[86]State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

[87]Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

[88]*Ibid.*

[89]Berry v. M. F. Donovan & Sons, 120 Me. 457, 115 Atl. 250 (1921); Madderns v. Fox Film Corp., 205 App. Div. 791, 200 N.Y. Supp. 344 (Sup. Ct. 1923); Wildfeuer v. Miller & Gold, 196 App. Div. 667, 188 N.Y. Supp. 81 (Sup. Ct. 1921); McBride v. Standard Oil Co., 196 App. Div. 822, 188 N.Y. Supp. 90 (Sup. Ct. 1921); see 1 Benedict § 30 n.22.

[90]Millers' Indem. Underwriters v. Braud, 270 U.S. 59 (1926).

The "maritime but local" doctrine served a very definite purpose. It is unquestionable that the *Jensen* case held properly that the uniformity and harmony of the general maritime law would be disrupted by permitting recovery under state acts when workers are injured in a purely maritime situation. But the correctness of the decision did not alter the inequity created by it when it left thousands of injured workers without remedy. In establishing the "maritime but local" doctrine, the court allowed recovery under the state acts for the greatest number of workers possible without endangering the uniformity and harmony of admiralty too seriously.

B. The Longshoremen's and Harbor Workers' Act

In 1927, Congress passed the Longshoremen's and Harbor Workers' Act[91] to provide coverage for injured land-based workers. This act provided coverage for disabilities or death resulting from ". . . an injury occurring upon the navigable waters . . . (including any dry dock) and . . . recovery for the disability or death through workmen's compensation proceeding may not validly be provided by state law."[92]

The Longshoremen's Act was exclusive within its field and superseded any state statute which may be in conflict.[93] Congress allowed the state action to show the courts that Congress did not intend to legislate beyond its authority.[94] The act should be liberally construed.[95] In doubtful cases, where either the Longshoremen's and Harbor Workers' Act or the state act might be employed the action should be filed in both state and federal courts to prevent the statute of limitations from destroying the claim.[96] The state is still permitted the creation of a right of recovery for a maritime tort in the absence of congressional legislation,[97] but the question is always whether the state has the authority to act in a particular situation, not the mere fact of state action.[98]

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[91]Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958).

[92]44 Stat. 1426 (1927), 33 U.S.C. § 903 (1958).

[93]Guerrido v. Alcoa S.S. Co., 234 F.2d 349, 353 (1st Cir. 1956); Dawson v. Jahncke Drydock, 33 F. Supp. 668 (E.D. La. 1940); Rhinehart v. T. Smith & Sons, 14 So. 2d 287 (La. Ct. App. 1943); Arcand v. Gutterson & Gould, 91 N.H. 194, 16 A.2d 697-98 (1940); Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (Hudson County Ct.), *aff'd*, 20 N.J. Super. 486, 90 A.2d 84 (1952); Colonna Shipyard, Inc. v. Bland, 150 Va. 349, 143 S.E. 729 (1928).

[94]Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962); De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481 (5th Cir. 1944).

[95]De Bardeleben Coal Corp. v. Henderson, *supra* note 94, at 483; Travelers Ins. Co. v. Branham, 136 F.2d 873, 875 (4th Cir. 1943); Ayers v. Parker, 15 F. Supp. 447 (D. Md. 1936).

[96]Ayers v. Parker, *supra* note 95.

[97]Meade v. Luksefjell, 148 F. Supp. 708, 709 (S.D.N.Y. 1957).

[98]United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir. 1933), *cert. denied*, 290 U.S. 639 (1933).

The propriety of state action must be determined by each case as it arises.[99]

There was a question as to the constitutionality of the Longshoremen's and Harbor Workers' Act. It was thought that the act may have invaded the powers reserved to the states under the tenth amendment.[100] The act was considered constitutional under the rule that permitted state workmen's compensation acts,[101] and because recovery was allowed only where the state had no authority to act.[102] State and federal governments may legislate within the same fields, but the state may not contravene an applicable act of Congress or affect the general maritime law.[103]

The act applies to most workers employed on completed vessels, other than masters or members of the crew.[104] These may include handymen,[105] stevedores and longshoremen, workmen repairing the ship,[106] and railroad train crews on ferry cars.[107] The injury may occur on navigable waters while work is being performed on a vessel, or while the vessel is on a marine railway or in a dry dock. The action may accrue while work is being done to the dry dock itself.[108]

The state acts cover all injuries that occur on land, or anything considered an extension of land, as a pier or a bridge.[109] The determining factor in ascertaining jurisdiction is always the location of the act and not the employment status of the worker.[110]

If payments are invalidly rendered under the state act, the amount paid is deducted from any award given under the federal act.[111] Further,

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[99]State *ex rel.* Kansas City Bridge Co. v. Missouri Workmen's Compensation Comm'n, 81 S.W.2d 986 (St. Louis Ct. App. 1935); *cf.* Moore v. Purse Seine Net, 105 P.2d 919 (Cal. 1940). See also Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 507 (1888).

[100]U.S. CONST. amend. X; Rhinehart v. T. Smith & Sons, 14 So. 2d 287, 293 (La. Ct. App. 1943).

[101]Baltimore & O. R.R. v. Parker, 4 F. Supp. 815, 817 (D. Md. 1933); Rhinehart v. T. Smith & Sons, *supra* note 100.

[102]Baltimore & O. R.R. v. Parker, *supra* note 101 at 816.

[103]Adreance v. Lorentzen, 60 N.Y.S.2d 834, 836-37 (Sup. Ct. 1946).

[104]HANNA 12-13.

[105]South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 260 (1940).

[106]Taylor v. McManigal, 14 F. Supp. 419, 421 (W.D. Mich. 1936).

[107]Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953); Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128 (1930).

[108]See generally HANNA 12-14.

[109]See Jeffers v. Foundation Co., 85 F.2d 24-25 (2d Cir. 1936).

[110]Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941). See also People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393, 401 (1857); Note, 45 CORNELL L.Q. 148 (1959).

[111]Puget Sound Nav. Co. v. Marshall, 31 F. Supp. 903, 907 (W.D. Wash. 1940).

the Longshoremen's and Harbor Workers' Act is exclusive only where it provides a remedy, and not in all damage actions, as an action for fraud, which may be pursued in state courts.[112]

C. Local Administration after the Act

After the passage of the Longshoremen's and Harbor Workers' Act, the "maritime but local" doctrine continued to flourish.[113] The yardstick used to apply state workmen's compensation acts appears simple enough—recovery under the state act must "work no material prejudice to the essential features of the general maritime law."[114] The decisions of the court belie the simplicity of this yardstick.[115]

The classic example of judicial confusion in this matter occurred in the case of *Parker v. Motor Boat Sales, Inc.*[116] The action accrued when a janitor was assigned to another employee to look for submerged objects in the muddy river while an outboard motor was tested. This was not a regular part of the janitor's duties. The janitor was killed and his widow brought an action under the federal act. The Supreme Court reversed the denial of award in the Court of Appeals for the Fourth Circuit giving compensation under the federal act.[117]

The Supreme Court, strangely, did not consider the doctrine rendered in the *Garcia*[118] and *Rohde*[119] cases. Surely, no tort could have been more local in character, nor could have recovery under the state law affected the uniformity and harmony of the maritime law in any conceivable way. Yet, the Court established this decision solely on the *Jensen* doctrine[120] without consideration of further possibilities.

It is interesting to consider why the Court continued to exercize and implement the "maritime but local" doctrine after the passage of the Longshoremen's and Harbor Workers' Act. The Court unquestionably did not know the full intention of Congress when recovery was allowed under the state workmen's compensation acts. It is submitted that the *Parker* case enhances the doctrine established by *Jensen*, and is the proper decision in this situation, even though it is not in conformity with the earlier decisions dealing with analogous situations.

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[112]Flamm v. Bethlehem Steel Co., 18 Misc. 2d 154, 185 N.Y.S.2d 136 (Sup. Ct.), *aff'd* 10 App. Div. 2d 881, 202 N.Y.S. 222 (App. Div. 1959).

[113]BAER § 1-15.

[114]Crowell v. Benson, 285 U.S. 22, 39-40 n.3 (1932), quoting from Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

[115]BAER § 1-15.

[116]314 U.S. 244 (1941).

[117]*Id.* at 244-47.

[118]Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

[119]Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

[120]Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 249-51 (1941).

D. The Twilight Zone

The confusion created by the *Parker* case became "illogic" the following year when the "twilight zone" came into existence. This monster was created in *Davis v. Department of Labor and Indus.*[121] A steel worker, employed in the dismantling of a bridge onto a barge, was drowned due to a fall he received when knocked from the barge into the river.[122] Workers such as Davis "occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation."[123]

The Court refused to overrule *Jensen.*[124] It held, instead, that while the federal act was exclusive, this was meaningless until the litigant has been found to occupy one side or the other of the doubtful jurisdictional line.[125]

The holding of Mr. Justice Black can be summed up in his own language: "There is . . . a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."[126]

The Court relied heavily on the presumption of constitutionality in favor of the state statute that covered Davis.[127]

Admittedly illogical, the "twilight zone" doctrine removed the hazard for dubious workers by permitting coverage under either the state or federal act. The risk of maintaining an unsuccessful suit before one agency and the statute of limitations acting as a bar to the other has been removed.[128] But the *Davis* case left no standards for determining what activities fell into the twilight zone.[129]

In 1948, the Supreme Judicial Court of Massachusetts allowed an award under the statute for a crane operator who was injured by falling on a ship that was in a floating dry dock for repairs.[130] The court did not try to reconcile the decision with previous authorities, merely stating that it would be futile to reason logically.[131] This decision was affirmed by the Supreme Court by simply citing the *Davis* case as authority.[132]

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[121]317 U.S. 249 (1942).

[122]*Id.* at 250-53.

[123]*Id.* at 253.

[124]*Id.* at 256.

[125]*Ibid.*

[126]*Ibid.*

[127]*Id.* at 257; South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 188-91 (1938).

[128]Note, 53 YALE L.J. 348 (1944).

[129]Note, 45 CORNELL L.Q. 148 (1959).

[130]Moores's Case, 323 Mass. 462, 80 N.E.2d 478 (1948).

[131]*Id.* at 467, 80 N.E.2d at 481.

[132]Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

However, the "twilight zone" doctrine does not apply to conflicts between federal compensation statutes. A railroad brakeman, covered by the Federal Employees Liability Act[133] and Safety Appliances Act[134] sustained an injury while releasing a freight car aboard a car float in navigable waters.[135] The Court would not permit the "twilight zone's" prevalence when two federal compensation statutes came into conflict.[136] While the claimant was a railroad worker, the *location* of the tort was within the purview of the Longshoremen's and Harbor Workers' Act, and any compensation had to be awarded through that act.[137] This case sustained the early decision rendered in *Nogueira v. New York, N.H. & H.R.R.*[138]

From these two decisions, it now seems clear that if the conflict exists between two federal statutes, one granting a trial by jury, as the FELA, and the other being purely a compensation statute, the Court will make every effort to find in favor of the compensation statute.[139] However, this is not true when the claimant may proceed with a jury in a state-federal conflict.[140] The "twilight zone" exists in all such conflicts.[141]

E. State Action in the Twilight Zone

If the "maritime but local" doctrine created confusion in the state courts, the "twilight zone" doctrine caused chaos. The state courts had difficulty comprehending the meaning of the doctrine. Many courts would use any excuse to circumvent invoking the doctrine, and would simply apply the federal act when any action accrued on navigable waters. Other states used the "twilight zone" indiscriminately and invoked it whenever any possibility of applying state compensation laws was possible.

Mississippi belongs to the former group. In an early decision, the Mississippi Supreme Court granted recovery under workmen's compensation when the claimant was injured while making a channel of the Mississippi River fit for navigation.[142] After the advent of the "twilight zone," Mississippi refused to allow recovery when a barge captain died from a heart attack on board the docked vessel. Mississippi would not

[133] 35 Stat. 65 (1908), 45 U.S.C. § 51-59 (1958).

[134] 27 Stat. 531 (1893); 45 U.S.C. § 1-46 (1958).

[135] Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953).

[136] *Id.* at 341 n.8.

[137] *Ibid.*

[138] 281 U.S. 128 (1930); 52 MICH. L. REV. 445 (1954).

[139] See generally Baer § 1-16; Note, 45 CORNELL L.Q. 148 (1959).

[140] Hahn v. Ross Island Sand & Gravel Co, 359 U.S. 272 (1959).

[141] *Ibid.*

[142] Orleans Dredging Co. v. Frazie, 182 Miss. 193, 161 So. 699 (1935), *aff'd* 180 So. 816 (1938).

evoke the "twilight zone" doctrine and followed the *O'Rourke* case.[143] It is submitted that there was actually no "twilight zone" situation in the above case. The court decided properly, but exhibited their reluctance to apply either the "twilight zone" or "maritime but local" doctrines in this jurisdiction.[144] This court agrees with the authorities that consider the "twilight zone" as an extension of the "maritime but local" rule rather than superseding it.[145]

Louisiana is typical of the states that represent the second point of view. One of the first decisions implementing the *Jensen* case arose in this state.[146] Yet no state has attempted to circumvent the unfortunate results of these decisions with greater vehemence than Louisiana. Ironically, Louisiana, the only non-common law state in the union, found a crack in the *Jensen* doctrine and let a purely maritime worker maintain an action for his common law remedy, while denying recovery through workmen's compensation.[147] By this decision, Louisiana became the vanguard of states whose courts liberally applied the "maritime but local" doctrine.[148] To be in admiralty jurisdiction, the injury must be committed upon navigable waters and in the performance of a *maritime* duty.[149] In the face of the *Jensen* doctrine, Louisiana allowed common law recoveries, and further allowed application of their workmen's compensation in situations seemingly forbidden by the federal act.[150]

After the "twilight zone" became established, the Louisiana courts found a perfect peg on which to hang decisions that permitted recovery under the state act.

In a situation almost identical in facts to *Parker v. Motor Boat Sales*,[151] Louisiana permitted recovery for a non-maritime worker who fell from a motor-boat while on an errand for his employer.[152] While the result is probably more realistic than the *Parker* decision, nevertheless

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[143]Valley Towing Co. v. Allen, 236 Miss. 51, 109 So. 2d 538 (1959); DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 225.2 (Supp. 1963). See also Larry v. Moody, 242 Miss. 267, 134 So. 2d 462 (1961).

[144]Valley Towing Co. v. Allen, *supra* note 143, at 53-64, 109 So. 2d at 542-43.

[145]*E.g.*, HANNA 7-8.

[146]Peters v. Veasey, 251 U.S. 121 (1919).

[147]Gray v. New Orleans Dry Dock & Shipping Co., 146 La. 826, 84 So. 109 (1920). See Annot., 25 A.L.R. 1029 (1923).

[148]Swan v. Baton Rouge Transp. Co., 197 So. 191 (La. Ct. App. 1940); Dourrieu v. Board of Comm'rs, 158 So. 581 (La. Ct. App. 1935); White v. J. P. Florio Co., 126 So. 452 (La. Ct. App. 1930). *But see* Haynes v. Luckenbach Gulf S.S. Co., 170 So. 909 (La. Ct. App. 1936).

[149]Dawson v. Jahncke Dry Docks, 18 La. App. 368, 131 So. 743 (1931).

[150]See T. Smith & Sons v. Williams, 275 F.2d 397, 399 (5th Cir. 1960); Sidney v. Lykes Bros. S.S. Co., 8 So. 2d 550 (La. Ct. App. 1942).

[151]314 U.S. 244 (1941).

[152]Beadle v. Massachusetts Bonding & Ins. Co., 87 So. 2d 339 (La. Ct. App. 1956).

this decision was never overruled, and an inferior Louisiana court held directly contrary to the United States Supreme Court. The same Louisiana court granted recovery to a stevedore who was injured in the hold of a ship. The court found that such an injury was within the "twilight zone" and there was an election between state and federal law in such a case.[153] However, this case was overruled; a stevedore in any similar situation being clearly covered by the federal act.[154]

A federal court attempted to untangle the web of confusion created by the Louisiana cases.[155] This court stated that a serious conflict had arisen between Louisiana and the federal courts due to an inconclusive line of irreconcilable cases.[156] But the Louisiana courts seemed to be unable to comprehend that the *Jensen* doctrine was *not* superseded by the "twilight zone," but was always found "breathing . . . as vital and vigorous as ever; well, almost as vital and vigorous."[157]

Other states have simply considered the federal cases irreconcilable,[158] and Texas, like Louisiana, has invoked the "twilight zone" with liberality.[159] Rhode Island,[160] Alaska,[161] and Virginia[162] have permitted state action in "twilight zone" situations, but, on the other hand, Georgia[163] has followed the more conservative approach used by Mississippi.

F. The *Calbeck* Case

There was general confusion over the application of the "twilight zone," but the confusion in Louisiana required the Supreme Court's mighty sword to cut the Gordian knot. Decedent was fatally injured while employed on an oil drilling barge. The barge had been launched even though it was still under construction. Decedent's wife recovered under the Louisiana Workmen's Compensation Act,[164] and later recovered an award under the federal act. This later award was disal-

[153]Richard v. Lake Charles Stevedores, 95 So. 2d 830 (La. Ct. App. 1957).

[154]Ellis v. Travelers Ins. Co., 123 So. 2d 780 (La. Ct. App. 1960), *aff'd* 241 La. 433, 129 So. 2d 729 (1961).

[155]T. Smith & Sons v. Williams, 275 F.2d 397 (5th Cir. 1960).

[156]*Id.* at 399.

[157]*Ibid.*

[158]Indemnity Ins. Co. of America v. Marshall, 308 S.W.2d 174, 179 (Tex. Civ. App. 1957).

[159]Emmons v. Pacific Indem. Co., 146 Tex. 496, 208 S.W.2d 884 (1948); Indemnity Ins. Co. of America v. Marshall, 308 S.W.2d 174 (Tex. Civ. App. 1957).

[160]Behrle v. London Guar. & Acc. Co., 76 R.I. 106, 68 A.2d 63 (1949), *cert. denied*, 339 U.S. 928 (1950).

[161]Alaska Packers Ass'n v. Industrial Accident Comm'n, 276 U.S. 467 (1928).

[162]Colonna's Shipyard v. Lowe, 22 F.2d 843 (E.D. Va. 1927).

[163]Maryland Cas. Co. v. Grant, 169 Ga. 325, 150 S.E. 424 (1929).

[164]La. Rev. Stat. §§ 23:1021-1351 (1950).

lowed by the Court of Appeals for the Fifth Circuit.[165] The United States Supreme Court reversed[166] after granting certiorari.[167]

The Court gives a complete analysis of admiralty compensation law[168] with emphasis on the "maritime but local" doctrine,[169] with special consideration of *Parker v. Motor Boat Sales, Inc.*[170] The court concluded that the wording of the statute was unclear.[171] The Louisiana court had predicated its recovery on their liberal application of the "twilight zone" doctrine rather than the "maritime but local" doctrine.[172] The Supreme Court held that no "twilight zone" existed. The claim arose on navigable waters, and

> Congress intended the compensation act to have a coverage coextensive with the limits of its authority. . . . No ground should be yielded to state jurisdictions in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them. . . .[173]

The court stated that the act reached ". . . *all* those cases of injury to employees on navigable waters. . . . whether or not a particular one was also within the constitutional reach of a state workmen's compensation law."[174] By this decision, it is now clear that *all* injuries suffered in or on navigable waters of the United States are within the purview of the federal act, hence creating an end to the confusing "maritime but local" doctrine, at least in this instance. The court further determined that acceptance of payments under the state act would not bar recovery under the federal act.[175]

Justices Stewart and Harlan entered a vigorous dissent. They condemned the majority's line of reasoning, urging that it is ludicrous to maintain that "Congress did not really mean what it said"[176] in section

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[165]Travelers Ins. Co. v. Calbeck, 293 F.2d 52 (5th Cir. 1961).

[166]Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).

[167]Calbeck v. Travelers Ins. Co., 368 U.S. 946 (1962).

[168]Calbeck v. Travelers Ins. Co., 370 U.S. 114, 117-22 (1962).

[169]*Id.* at 122-28.

[170]*Id.* at 127-31.

[171]See *Id.* at 125.

[172]See *Id.* at 128.

[173]*Id.* at 130, quoting from De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481, 484 (1944).

[174]*Id.* at 126-27.

[175]*Id.* at 131.

[176]*Id.* at 132.

903(a) of the Longshoremen's and Harbor Workers' Act.[177] The dissent doubted whether statutory language could be ignored in the name of effectuating congressional desire.[178]

The reasoning of the majority is incompatible with the statute, but the result reached is desirable and should reach the often discussed but frequently ignored "uniformity and harmony" of the maritime law. The beleaguered employee no longer has to risk having his action destroyed by the statute of limitations if he files in the wrong court. However, this decision does great violence to a large body of case law. The spirit of *Jensen* is motivated in this decision, but the court had to indulge in flagrant judicial legislation to accomplish an end to the many attempts to destroy this spirit.

G. After *Calbeck*

Few developments have had time to occur since the advent of this momentous decision. The language of the court was explicit in *Calbeck* that this decision had no effect on the "twilight zone,"[179] and this dicta was implemented by the Court of Appeals for the Fifth Circuit,[180] but a federal district court in Louisiana said that a worker injured in a "twilight zone" situation could elect to recover under the federal statute, even though the Louisiana statute stated that it was exclusive.[181]

Louisiana, however, permitted a worker killed while diving in the construction of a tunnel under navigable waters to be covered under the Louisianan act, while admitting the decision is open to question.[182] The state-federal controversy added a new wrinkle, when the Fifth Circuit, citing *Calbeck*, decided a recovery under the Jones Act was not foreclosed by res judicata or collateral estoppel.[183]

The body of the law, while small, will permit some definite conclusions. The "twilight zone" is still very much alive, but perhaps limited by *Matherne v. Superior Oil Co.*[184] It is submitted that *Eubanks v. New Amsterdam Cas. Co.*[185] is manifestly wrong, as it is in direct contradiction to *Calbeck* and will have little effect, if any, on the law.

Still, many questions remain unanswered. The determination of who is a member of a crew has not been decided; the limits of a dry

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[177]See page 93, *supra.*

[178]Calbeck v. Travelers Ins. Co., 370 U.S. 114, 132 (1962) (dissent).

[179]*Id.* at 128-29.

[180]Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc., 308 F.2d 570 (5th Cir. 1962).

[181]Matherne v. Superior Oil Co., 207 F. Supp. 591 (E.D. La. 1962).

[182]Eubanks v. New Amsterdam Cas. Co., 153 So. 2d 86 (La. Ct. App. 1963).

[183]Mike Hooks v. Pena, 313 F.2d 696 (5th Cir. 1963).

[184]Matherne v. Superior Oil Co., 207 F. Supp. 591 (E.D. La. 1962).

[185]Eubanks v. New Amsterdam Cas. Co., 153 So. 2d 86 (La. Ct. App. 1963).

dock remain in doubt; and whether the "twilight zone" doctrine may be applied in these cases.[186] How far reaching is the decision? No question is really answered except *all* injuries occurring on navigable waters are in the purview of the federal act.[187]

The courts now have a substantial precedent. They may clear some of the confusion created by previous conflicting decisions by following this case, or they may, as they have done in the past, destroy its desirous effects by rendering a new mass of contradictory opinions.

Joseph D. Gordon, Jr.

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[186]17 Sw. L.J. 345 (1963).

[187]41 N.C.L. Rev. 597 (1963); 1963 Duke L.J. 327.

RECENT DECISIONS

Constitutional Law—Equal Protection Clause Affecting Application of State Trespass Laws

Petitioners, Negro boys and girls who sat at store lunch counters after being ordered to leave by the manager, were convicted for violating the state trespass statute.[1] A city ordinance proscribed racially desegregated facilities.[2] The Supreme Court of South Carolina affirmed the convictions. Held: Reversed. When a state agency passes a law compelling persons to discriminate because of race, and the state's processes are employed in a way which enforces this discrimination, such a palpable violation of the fourteenth amendment cannot be saved by attempting to separate the mental urges of discriminators and contending that they would have discriminated irrespective of state action. *Peterson v. City of Greenville*, 83 Sup. Ct. 1119 (1963).

Petitioners, Negro and white college students, were convicted of violating a Louisiana criminal mischief statute[3] upon refusing to obey restaurant manager's order to leave the privately owned restaurant. Earlier, the superintendent of police and the mayor had issued statements that such demonstrations were to be prohibited and that the police department stood ready to enforce the laws of the city of New Orleans. The convictions were affirmed by the Supreme Court of Louisiana. Held: Reversed. The statements of city officials, having as much coercive effect as an ordinance, prohibited any conduct toward discontinuance of segregated private restaurants and the trespass convictions could not stand. *Lombard v. Louisiana*, 83 Sup. Ct. 1122 (1963).

The equal protection clause nullifies state action only when it is without any reasonable basis and therefore purely arbitrary.[4] The clause was designed to assure the Negro of civil rights that are enjoyed under the law by a white person.[5] Therefore, discrimination by a state merely because of race or color is purely arbitrary and unconstitutional.[6] However, the extent of the equal protection clause has been limited to state action only and does not prohibit private conduct resulting in discrimination.[7] Sufficient state action has been found in the discrimination of some restaurants which have rented their property from the state,[8] or have become an agency of the state,[9] or have become located in a public building.[10] In addition, a state or city may act as authoritatively through its executive as through its legislative body.[11] But prior to the instant cases the argument that state action exists by virtue of the fact that the

[1] S.C. Code, 1952 § 16-388 (Cum. Supp. 1960).

[2] Greenville, S.C. Code § 31-8 (1953).

[3] La. Rev. Stat. § 14:59(6) (1950) (Cum. Supp. 1960).

[4] *E.g.*, Whitney v. California, 274 U.S. 357 (1927).

[5] See, *e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879).

[6] *Ibid.*

[7] See, *e.g.*, Civil Rights Cases, 109 U.S. 3 (1883).

[8] See, *e.g.*, Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 724 (1957).

[9] Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).

[10] See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[11] *Ex parte* Virginia, 100 U.S. 339 (1879).

business has become licensed by the state,[12] or that a restaurant is a service which has become a public interest[13] and that therefore the state is involved to a significant extent has been refused.

In the first "sit-in" case to reach the Supreme Court,[14] the question of whether state or private action was involved was avoided. The alleged offense occurred in an interstate bus terminal and the Court relied on the Interstate Commerce Act,[15] thereby leaving the effect of the equal protection clause unsettled. In an earlier case decided in a lower court[16] it was held that in the absence of a state statute requiring exclusion of Negroes from restaurants, the equal protection clause would not apply, as there was no state action. As long as the law applies to all alike the requirements of equal protection are met.[17] In the instant cases the Court states that when the processes of the state are employed in a way to enforce a discriminatory order or ordinance of an agency of the state there is sufficient state action to constitute a violation of the equal protection clause. The Court carries state action a step further in the *Lombard* case by treating announcements of city officials as equivalent to a city ordinance. In both cases the Court sets forth the theory that the reason motivating the possessor to act is immaterial. In his concurring opinion in the *Lombard* case, Mr. Justice Douglas goes even further and reasons that a state is involved to a significant extent if the service rendered by the private establishment has become a public interest or if it is licensed to do business by the state. He further concludes that in light of *Shelley v. Kraemer*[18] action by state courts constitutes state action and thus there was state action in the noted cases.

The argument of the Court, particularly that of Mr. Justice Douglas, is not without opposition. Should state action within the fourteenth amendment be construed to include such situations as arise in the noted cases? If private restaurant owners are restricted from invoking state assistance in removing those to whom they have, by their own determination excusive of an ordinance, denied service, this would limit proprietors to providing their own means of eviction.[19] This would certainly not be consonant with the principles of a nation which clings to good order as a fundamental concept.[20] Moreover, the motive or reasoning of the possessor should not be important but only the wrongful disturbance of his possession.[21] Earlier cases have rebutted the presumption of Mr. Justice Douglas that the licensing of a business constitutes state action under the fourteenth amendment or that a restaurant or similar business is a public interest involving the state to a significant extent.[22] There

[12]See Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

[13]*Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[14]Boynton v. Virginia, 364, U.S. 454 (1960).

[15]54 Stat. 924 (1940), 49 U.S.C. § 316(d) (1958).

[16]Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959).

[17]Louisiana v. Resweber, 329 U.S. 459 (1947).

[18]334 U.S. 1 (1948).

[19]Note, 47 VA. L. REV. 105, 120-21 (1961).

[20]*Ibid.*

[21]Comment, 37 N.C.L. REV. 73, 76 (1958). *But see* 36 N.Y.U.L. REV. 779, 797 (1961).

[22]See notes 12 and 13 *supra* and accompanying text.

is disagreement with his application of *Shelley v. Kraemer*[23] in the instant cases, which differ both analytically and practically from cases involving the enforcement of restrictive covenants.[24] Thus, to constitute state action as a result of court action alone, the private act enforced by the state courts must be a contract to discriminate; otherwise diminution of private property rights would not be warranted.[25] It is submitted that no right exists in one to occupy premises after being asked to depart, whereas there does exist a right to own property which may not be negated by state action.[26]

Taylor Byrd Smith

Constitutional Law—Federal Habeas Corpus For State Prisoners

Respondent and two others were convicted of a felony murder in 1942 with the only evidence against each defendant being his signed confession. Respondent did not join the other two defendants on appeal of their convictions. Although these appeals were unsuccessful, subsequent legal proceedings resulted in their releases in 1955 and 1956 on findings that their confessions had been coerced and their convictions therefore procured in violation of the fourteenth amendment.[1] After their release, respondent made application to the sentencing court in the nature of coram nobis. His conviction was finally affirmed in the New York Court of Appeals. Respondent was then denied relief on habeas corpus proceedings in the United States District Court for the Southern District of New York. The Court of Appeals for the Second Circuit reversed, ordering respondent's conviction be set aside and that he be released from custody unless given a new trial. Held: Affirmed. Jurisdiction of the federal courts on habeas corpus is conferred by the allegation of an unconstitutional restraint and is not affected by procedural defaults incurred by the applicant during state court proceedings. *Fay v. Noia*, 83 Sup. Ct. 822 (1963).

"[T]he most celebrated writ in the English law . . ."[2] was given express recognition in the United States Constitution.[3] Although federal habeas corpus was incorporated in the first grant of federal court jurisdiction,[4] it was not extended to prisoners in state custody.[5] The writ provided for redress of restraints contrary to fundamental law, by whatever authority imposed.[6] Personal liberty was deemed so great under the law that the question of the court's authority to try and imprison a party could be reviewed on habeas corpus even though the lower court

[23]334 U.S. 1 (1948).
[24]Comment, 21 La. L. Rev. 433, 438 (1961).
[25]*Id.* at 448.
[26]Comment, 37 N.C.L. Rev. 73, 76 (1958).

[1]Fay v. Noia, 83 Sup. Ct. 822 n. 1 (1963).
[2]3 Blackstone, Commentaries *129.
[3]U.S. Const. art. I, § 9.
[4]28 U.S.C. § 2241 (1958).
[5]*Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1844).
[6]See *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

decision might not be reversed.[7] Thus, the Court has maintained to the present that restraints in violation of constitutional rights may be challenged on federal habeas corpus even though pursuant to the decision in a federal court of competent jurisdiction.[8] The writ was extended by Congress in 1867[9] to state prisoners who alleged that they were being held in violation of federal constitutional requirements. In 1868 the appellate jurisdiction on federal habeas corpus of the United States Supreme Court was restricted, but this act[10] did not remove the broadened habeas corpus jurisdiction of the inferior federal courts. This appellate jurisdiction was not restored until 1885.[11] During this period the lower federal courts continued to discharge state prisoners whose convictions rested on unconstitutional grounds,[12] and upon the restoration of its jurisdiction the Court followed those principles and the principles enunciated in the "federal prisoner" cases.[13] Problems then began to occur concerning the federal-state relationship in the administration of criminal justice. It was held that the federal courts had the power to discharge a state prisoner in advance of trial where he was restrained in violation of his constitutional rights.[14] The Court qualified this by stating that considerations of comity should be applied requiring the federal court to stay its hand pending the outcome of state proceedings.[15] This doctrine of abstention allowed the states to administer their criminal justice freely but without prejudice to federal rights which might be involved in the proceedings.[16] This rule of exhaustion, particularly as stated in *Ex parte Hawk*,[17] was later codified in 28 U.S.C. section 2254. The Court has consistently followed the rule allowing relief under federal habeas corpus after exhaustion of state remedies except in one important case[18] wherein it was stated that the petitioner had been afforded due process since he had the opportunity to challenge his conviction in an impartial tribunal, *i.e.*, the state supreme court. This position was later repudiated as the Court held that the state decision, which was obtained after a coerced confession had been introduced as evidence, was not conclusive,[19] relying on the principle that state adjudication on federal constitutional issues is not res judicata.[20]

In the instant case, the applicant's failure to appeal within the limit set by state procedural rules did not affect the Court's power under the federal habeas corpus statute.[21] This requirement of exhaustion of state remedies under section 2254 is limited to those still open at the time the

[7] *Ex parte* Siebold, 100 U.S. 371, 376-77 (1879).
[8] *E.g.*, *Ex parte* Virginia, 100 U.S. 339 (1879).
[9] 28 U.S.C. § 2252 (1958).
[10] Ch. 34, § 2, 15 Stat. 44 (1868).
[11] 28 U.S.C. § 2253 (1958).
[12] *E.g.*, *Ex parte* McCready, 15 Fed. Cas. 1345 (No. 8732) (C.C.E.D. Va. 1874).
[13] *E.g.*, *Ex parte* Royall, 117 U.S. 241 (1886).
[14] *Id.* at 250-51.
[15] *Ibid.*
[16] *E.g.*, Minnesota v. Brundage, 180 U.S. 499 (1901).
[17] 321 U.S. 114 (1944).
[18] Frank v. Mangum, 237 U.S. 309 (1915).
[19] See Moore v. Dempsey, 261 U.S. 86 (1923).
[20] *E.g.*, Brown v. Allen, 344 U.S. 443 (1953).
[21] Fay. v. Noia, 83 Sup. Ct. 822, 827 (1963).

application for federal habeas corpus is filed with the court.[22] The Court refused to find whether the state coram nobis proceeding was an adequate state-ground for decision, thereby refusing to extend the doctrine to limit Supreme Court review.[23] "[T]he adequate state-ground rule is a function of the limitations of appellate review . . . . The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter* . . . ."[24] Furthermore, respondent's failure to appeal did not constitute an intelligent and understanding waiver[25] of this right, nor could it support an inference of deliberate bypassing of the state court, since a successful appeal might have resulted in retrial and a substantial risk of electrocution.[26] This decision overrules *Darr v. Burford*[27] to the extent that it required as a condition precedent to applying for federal habeas corpus that a state prisoner must ordinarily seek certiorari in the Supreme Court.[28] Such a requirement is unnecessarily burdensome on the judicial processes.

The Court recognizes that a federal judge must exercise limited discretion in hearing federal habeas corpus cases and allows him to deny relief to one who deliberately bypasses the state court system thereby forfeiting his state court remedies.[29] A vigorous dissent by Justices Harlan, Clark, and Stewart criticizes this statement, if it is an attempt to limit federal interference with state administration of criminal justice, as amounting to no limitation at all. The argument advanced by the dissenters is well illustrated by an interesting hypothetical[30] as to the validity of the application of the doctrine of the adequate state-ground rule. The dissenters also maintain forcefully that the sphere of autonomy of the state judicial systems in criminal cases arising under state law, as contemplated and established by the general design of the Constitution, will be destroyed by the present federal judicial trend toward the overexpansion of the scope and effect of federal habeas corpus proceedings in liberating persons regularly confined by state courts, unless this trend is reversed or greatly modified. Thus, they argue, a single constitutional provision which in no way defines the federal habeas corpus power, but merely forbids its suspension except under specified safeguards, is being construed by the Supreme Court so as to subvert the obvious basic plan of the Constitution, viewed as a whole, in reference to the distribution between the federal courts and state courts of the judicial powers operating in the United States. Compare the well known dogmatic announcements in *Erie Railroad v. Tompkins*.[31]

H. Wingfield Glover, Jr.

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[22] *Id.* at 847. Mooney v. Holohan, 294 U.S. 103, 115 (1935), *But see Ex parte* Spencer, 228 U.S. 652 (1913).

[23] Fay v. Noia, 83 Sup. Ct. 822, 827, 844 (1963).

[24] *Id.* at 844.

[25] Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (Classic definition of waiver).

[26] See Fay v. Noia, 83 Sup. Ct. 822, 849 (1963).

[27] 339 U.S. 200 (1950).

[28] Fay v. Noia, 83 Sup. Ct. 822, 847 (1963).

[29] *Id.* at 849.

[30] *Id. at* 861-65 (dissent).

[31] 304 U.S. 64 (1938).

CONSTITUTIONAL LAW—STATE ANTI-DISCRIMINATION STATUTE APPLIED TO INTERSTATE AIR CARRIER

Complaint was brought before the Colorado Anti-Discrimination Commission charging violation of state law in the hiring of pilots by an interstate air carrier.[1] The Commission, after hearings, found as a fact that discrimination had existed and ordered the carrier to cease and desist from its discriminatory practices. The Commission further determined that the carrier, in requiring on its application form the racial identity and a photograph of the applicant, was acting in a manner contrary to the Commission's regulations. It was decided by the state court that the act could not be applied to the hiring of flight crew personnel of an interstate air carrier since to do so would impose an undue burden upon interstate commerce. HELD: Reversed. Prohibition of discrimination in employment of pilots by an interstate carrier does not impose a constitutionally prohibited burden upon interstate commerce. *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 83 Sup. Ct. 1022 (1963).

The framers of the Constitution apparently never reached agreement as to the scope and effect of the commerce clause.[2] Certainly, two of the more famous early chief justices, Marshall and Taney, had differing opinions as to its meaning.[3] The Court has suggested a number of guidelines for use in determining whether state legislation is valid, including absence of exercise of congressional power in the field; absence of conflict where Congress has acted; non-interference with any system established as a result of congressional regulation, and lack of congressional legislative intent to pre-empt a field in which Congress has acted.[4] The Court also has used in many instances the test of whether the burden on commerce is direct or indirect.[5] The difficulty has been in the application of these guidelines to cases which differ widely in circumstances and fact. The Court has said in the final analysis there can be no single formula and that the determination must be made under the facts and circumstances of the particular case.[6]

The Court reasoned in the instant case that the requirement by Colorado preventing racial discrimination in hiring of pilots would not unduly burden commerce and that the hiring of employees was more local in nature than the transporting of passengers.[7] But it was pointed out that states could impose conditions on hiring of an interstate carrier's employees which would be considered an undue burden.[8] In considering the effect which the state legislation might have on federal law designed to prevent racial discrimination in interstate commerce, the Court said that even if it were assumed that the anti-discrimination clause

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[1]COLO. REV. STAT. ANN. § 80-24-6 (Supp. 1960).

[2]Note, 45 COLUM. L. REV. 927, 948, 949 (1945).

[3]Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547, 548 (1947).

[4]See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[5]*E.g.*, Erie R.R. Co. v. Williams, 233 U.S. 685 (1914).

[6]Hines v. Davidowitz, 312 U.S. 52 (1941).

[7]See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 83 Sup. Ct. 1022, 1025 (1963).

[8]*Id.* at 1026.

of the Federal Aviation Act[9] was intended to protect job applicants as well as to prevent rate discrimination, the Colorado statute would not frustrate any part of the legislation.[10] Provisions of the Railway Labor Act[11] which have been made applicable to air carriers had been held previously to require employers to simply refrain from aiding unions in breaching their duty.[12] Thus, this act was not affected by the Colorado anti-discrimination statute. Finally, the matter of requiring government contracting agencies to include clauses in their contracts by which contractors bind themselves not to discriminate against employees and applicants for hire was analyzed.[13] The Court said no intention could be found here on the part of the executive to regulate air carrier discrimination among employees and applicants for hire so as to preempt state legislation designed to accomplish a like purpose.[14]

It can be seen that the Court satisfied itself that the Colorado statute did not unduly burden interstate commerce and that it was not in conflict with federal law preempting the field. The statute, having met these two tests, was considered a valid exercise of state power. It is submitted that the decision cannot be considered as establishing any trend toward increasing the power of states. Rather, it can be presumed to indicate the Court's continued interest in the rights of the individual and its reluctance to strike down any statute, federal or local, which was designed to protect such rights.

W. P. Starnes

Criminal Law—Admissibility of Evidence Obtained by Unlawful Search and Seizure

Defendant was arrested on a charge of disorderly conduct in disturbing the peace of another.[1] After the arrest an officer returned to defendant's home, and, with the permission of his wife, searched his automobile, obtaining evidence to corroborate the complaining party's identification of the automobile. At the trial the testimony of the officer was introduced without objection from the appellant. However, at the close of the state's evidence the defendant moved for a directed verdict, or that the case be dismissed because some of the testimony introduced was illegally obtained. The motion was refused and the defendant was convicted. He appealed, assigning as error the admission of the illegally obtained evidence. Held. Reversed and remanded. Ordinarily in the absence of timely objection, error can not be predicated upon the im-

[9]72 Stat. 731 (1958). 49 U.S.C. §§ 1301-1542 (1958).

[10]See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 83 Sup. Ct. 1022, 1027 (1963).

[11]44 Stat. 577 (1926), 45 U.S.C. §§ 151-188 (1958).

[12]Conley v. Gibson, 355 U.S. 41 (1957).

[13]Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

[14]Colorado Anti-Discrimination Comm'n v. Continental Air Lines Inc., 83 Sup. Ct. 1022, 1027 (1963).

[1]Miss. Code Ann. § 2089.5 (1956).

proper admission of testimony obtained by illegal search, but errors affecting fundamental constitutional rights are exceptions to the rule. *Henry v. State,* No. 42717, Sup. Ct. Miss., June 10, 1963.*

In 1961 the U.S. Supreme Court held that evidence obtained by unlawful search and seizure may no longer be used in a state prosecution.[2] Apparently, this decision recognizes that exclusion can be obtained only by motion or objection, as procedure may require.[3] Courts considering this proposition have continuely held that such objection or motion must be seasonably made in order to raise the question on appeal.[4] The Mississippi Supreme Court has long held that evidence obtained by an illegal search and seizure is not admissible in a state prosecution.[5] Both before[6] and after[7] the *Mapp* decision, Mississippi courts have required an objection to be made at the time the evidence is submitted in order to raise the question on appeal. A motion to exclude such testimony or evidence at the conclusion of the evidence will not suffice.[8] It has been recognized that a trial judge may reject incompetent testimony on his own motion,[9] but it has never been held to be reversible error if the court failed to do so.[10] The instant case is said to be within the narrow exception to the general rule as established by *Brooks v. State.*[11] It has since been pointed out that the court in this case seemed to ignore and pass lightly over the many cases, not only in Mississippi, but throughout the nation that held otherwise.[12] The opinion now appears to be that the conviction in the *Brooks* case was reversed because the defendant was not adequately represented.[13]

The apparent reasons given to justify the reversal are as follows: (1) Numerous recent cases in this state have been tried by nonresident attorneys who are not adept in the technique of jury trial in the criminal courts of Mississippi, casting an unusual burden upon the trial judge in determining how to eliminate objectional testimony when no objection is made, while at the same time insuring a fair trial by due process of law. (2) Without the testimony of the officer who made the illegal search the testimony of the prosecuting witness would be uncorroborated. Reversal on the grounds that the attorneys for the defendant were nonresidents would be questionable since a showing of incompetency

*EDITOR'S NOTE: Since this note was submitted, a suggestion of error was sustained in the instant case on the grounds that error cannot be predicated upon admission of evidence to which no objection was made, and that defense counsel were not so inadequate as to make the trial a judicial farce. Henry v. State, 154 So. 2d 289 (1963).

[2]See Mapp v. Ohio, 367 U.S. 643 (1961).

[3]Shorey v. State, 227 Md. 385, 177 A.2d 245, *cert. denied,* 371 U.S. 928 (1962).

[4]*E.g.,* People v. King, 26 Ill. App. 2d 586, 188 N.E.2d 11 (1963).

[5]*E.g.,* Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

[6]*E.g.,* Boutwell v. State, 165 Miss. 16, 143 So. 479 (1932).

[7]*Accord,* Gaughf v. City of Jackson, 243 Miss. 50, 137 So. 2d 190 (1962).

[8]*E.g.,* Harris v. State, 153 Miss. 1, 120 So. 206 (1929).

[9]Smith v. City of Louisville, 215 Miss. 213, 60 So. 2d 601 (1952).

[10]See Rodgers, *Search and Seizure in Mississippi,* 28 MISS. L.J. 20, 48 (1956).

[11]209 Miss. 150, 46 So. 2d 94 (1950).

[12]Rodgers, *Search and Seizure in Mississippi,* 28 MISS. L.J. 20, 48 (1956).

[13]Bennett v. State, 52 So. 2d 837 (Miss. 1951); Comment, 34 MISS. L.J. 304, 322 (1963).

would apparently be necessary. The weight of authority holds that to show incompetency the trial must be reduced to a farce and a sham.[14] No case has been found in which the Mississippi court has passed on this specific question. Reversal upon the ground that the prosecuting witness's testimony was uncorroborated appears even more questionable. Mississippi has adhered to the rule that corroboration is not necessary in such cases to sustain the conviction where the testimony of the prosecuting witness is not unreasonable and not impeached.[15] Only where facts and circumstances tend to discredit the testimony is it said to be unreasonable and ground for a new trial.[16]

Without further clarification as to the grounds for the decision, it leaves a questionable area in the criminal procedure of Mississippi. One is now lead to believe that a new trial may be obtained for the reason that the defendant was represented by a nonresident attorney who was not familiar with trial procedure in Mississippi.

Richard D. Foxworth

Criminal Law—Discharge of Jury Because of Absent Witness as Double Jeopardy

The petitioner was indicted for forging and uttering checks which he had stolen from the mail. When the case was called for trial, the jury was selected and sworn even though the state then knew that its key witness, the payee on the stolen checks, had been neither located nor subpoenaed to appear. When the jury returned that afternoon for the beginning of the trial, the state asked that the jury be discharged because its key witness was still missing. The jury was discharged over the petitioner's objection. Two days later when a second jury was impaneled for the same trial, the petitioner's plea of former jeopardy was overruled, and he was found guilty. Held: Reversed. Where the state knows that it has failed to either locate or to subpoena its key witness when the jury is elected and sworn, the discharge of the jury because this same key witness is absent at the trial's commencement constitutes former jeopardy if the accused is again tried on the same indictment before a second jury. *Downum v. United States*, 83 Sup. Ct. 1033 (1963).

From a very early period there arose the established common law maxim that a man ought not to be endangered twice of his life or liberty for one and the same offense.[1] Incorporated into the United States Constitution[2] and the constitution of almost every state in the union,[3] the rule against double jeopardy both prohibits a second punishment for the same offense[4] and forbids a second trial for the same offense.[5] A

[14]See Annot., 74 A.L.R.2d 1403 (1957).

[15]*E.g.*, Holt v. State, 186 Miss. 727, 191 So. 673 (1939).

[16]*E.g.*, Monroe v. State, 71 Miss. 196, 13 So. 884 (1893).

[1]*E.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1873).

[2]U.S. Const. amend. V.

[3]*E.g.*, Miss. Const. art. 3, § 22.

[4]See, *e.g.*, Kepner v. United States, 195 U.S. 100, 137 (1904).

[5]*E.g.*, Stroud v. United States, 251 U.S. 15 (1919).

jury's verdict is not required to place the defendant in jeopardy.[6] Jeopardy attaches when the jury is selected and sworn so that it is charged with the delivery of the accused.[7] It follows that if a jury is discharged after it is impaneled and sworn, but before it delivers a verdict, that discharge would constitute a defense of former jeopardy if the accused were later tried on the same indictment before a second jury.[8] Today, however, it has been judicially recognized that a court may discharge a jury if there is a manifest necessity for that discharge and if it would more effectively maintain the ends of justice.[9] Adjudicated examples of the court's power to discharge a jury without acquitting the accused are a mistrial declared because the jury are unable to agree;[10] the sudden illness of an attorney,[11] the defendant,[12] the trial judge,[13] or a juror;[14] and the unexpected refusal of a witness to swear to the truth of his testimony.[15]

In the instant case the majority refused to state that the absence of a witness would never justify the discontinuance of a trial. The minority were of the opinion that because of the unusually heavy docket for that week, the correspondingly large number of witnesses to be summoned, and because the petitioner's trial was delayed for only two days after the discharge of the jury, the petitioner had not been placed in jeopardy. They reasoned that the absence of the witness was beyond the control of the state. An early Iowa decision, which held that the discharge of a jury because of the absence of a witness constituted double jeopardy, recognized that only those circumstances over which neither the court nor the attorney could possibly exercise any control would suffice as manifest necessities for the discharge of the jury.[16] Another case which concerned the discharge of the jury because of the witness's absence declared that only an Act of God or a similar unforeseeable occurrence, which rendered the continuance of the trial impossible, would justify the discharge of the jury.[17] It has been held that where there is a feasible alternative to the discharge of the jury, the jury's discharge by the court will effectively acquit the defendant.[18] In one case a three-year-old girl was declared incompetent as a witness, and the trial judge subsequently discharged the jury because of surprise to the state. The court decided that the discharge created former jeopardy because the state ought not to have been surprised by the court's ruling that a three-year-old is incompetent as a witness.[19] In Mississippi, where the discharge of the

[6] *E.g.*, Teat v. State, 53 Miss. 439, 453 (1876).

[7] *E.g.*, Allen v. State, 52 Fla. 1, 41 So. 593 (1906).

[8] Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

[9] *E.g.*, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[10] *E.g.*, Logan v. United States, 144 U.S. 263 (1892).

[11] United States v. Watson, 28 Fed. Cas. 499 (No. 16,651) (D.S.D.N.Y. 1868).

[12] *E.g.*, State *ex rel.* Williams v. Grayson, 90 So. 2d 710 (Fla. 1956).

[13] *E.g.*, State v. Critelli, 237 Iowa 1271, 24 N.W.2d 113 (1946).

[14] *E.g.*, Thompson v. United States, 155 U.S. 271 (1894).

[15] United States v. Coolidge, 25 Fed. Cas. 622 (No. 14,858) (C.C.D. Mass. 1815).

[16] State v. Calendine, 8 Iowa 288 (1859).

[17] People v. Barrett, 2 Cai. R. 304 (N.Y. 1805).

[18] Pizano v. State, 20 Tex. Crim. 139 (1886).

[19] Hipple v. State, 80 Tex. Crim. 531, 191 S.W. 1150 (1917).

jury has been held to constitute double jeopardy, that holding has been based on the proposition that jeopardy attaches when the jury is impaneled and sworn;[20] but in a preponderance of cases, the Mississippi Supreme Court has said that jeopardy attaches only after an acquittal or a conviction of the accused by the jury charged with his delivery.[21]

The objective of the doctrine of double jeopardy is to insure that the state with all its power and resources does not harass or exhaust the accused by successive, oppressive persecutions;[22] but this objective shall never be attained if the state is privileged to effect the discharge of the jury so that it may again try the accused merely because it has knowingly failed to prepare for the trial. To achieve that objective, it is mandatory that the state exercise every precaution that is within its control to have its witnesses available when the trial begins.

Thomas Allen Coleman

Trade Regulations—Primary Line Price Discrimination and the Commerce Requirement

Defendant, a corporation engaged in interstate commerce, operated a number of dairy products processing and distribution plants in Ohio, under the supervision of its Ohio district office. One such plant at Shelby, Ohio, distributing its products only in intrastate commerce, competed in the Willard, Ohio, market with plaintiff, an intrastate dairy corporation, and also made sales in the Marion, Ohio, market in which plaintiff did not compete. With the approval of the district office in Cleveland, defendent's Shelby plant reduced its prices in the Willard market, making necessary a corresponding reduction by plaintiff, but maintained existing prices in Marion. The reduced price was allegedly a loss-price for the plaintiff, resulting in an injury for which plaintiff sought relief under the Robinson-Patman Act.[1] Concerning the requisite element of commerce in such actions, the complaint, while stating defendant's interstate character, confined the allegations of price discrimination to the different prices exacted by defendant through its Shelby plant, in Willard and Marion, there being no allegations of specific discriminatory sales made across state lines. During discovery proceedings, the court refused to compel one of defendant's officers to answer certain questions on deposition which were designed to show that other of defendant's processing plants in the Ohio district were, at the time of the price-cut in Willard, maintaining higher prices in sales across state lines. Accordingly, plaintiff moved to amend its complaint to allege discriminatory sales in interstate commerce by processing plants other than Shelby, *i.e.*, the other Ohio district plants. Various affidavits were produced in support of this allegation, as well as a West Virginia state court record which showed that defendant had successfully asserted the right of one of its Ohio plants to compete in West Virginia.

[20] *E.g.*, Teat v. State, 53 Miss. 439, 453 (1876).

[21] *E.g.*, State v. Pace, 210 Miss. 448, 49 So. 2d 710 (1951).

[22] Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

[1] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958), amending 38 Stat. 730 (1914).

Leave to amend was denied, and defendant's motion for summary judgment of dismissal with prejudice was granted on the ground that there was no substantial issue as to the element of commerce. HELD: Affirmed. Plaintiff relied on the alleged discriminatory sales in the Marion market, which were purely intrastate transactions, and the fact that defendant also made interstate shipments from other than its Shelby, Ohio, plant to areas in which plaintiff did not engage in competition is immaterial. *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F.2d 943, (6th Cir. 1962), *cert. denied*, 83 Sup. Ct. 1534 (1963), Black, J., dissenting. "I believe that the Court of Appeals in the present case misconstructed both the statute and *Moore*[2] when it held that respondent's interstate shipments 'from other than its Shelby, Ohio, plant' were 'wholly immaterial' to this case."

The Robinson-Patman amendment to Section 2 of the Clayton Act makes it unlawful for any person engaged in interstate commerce, in the course of such commerce, to discriminate in price between different purchasers of commodities of like grade and quality, where any of the purchases involved are in commerce, and where the effect of such discrimination may be substantially, *inter alia*, to injure, destroy or prevent competition with any person who grants the discrimination or with customers of the person who grants the discrimination.[3] The cause of action must be based on at least two sales by the same person to two different purchasers at different prices, one of which must have been made in commerce, and the prescribed injury to competition must have resulted.[4] The competition affected by the discrimination may be primary line,[5] in which the injured party is a competitor of the seller; secondary line,[6] where the plaintiff is a purchaser from the defendant who competes with other purchasers from the same supplier; and tertiary line,[7] in which the competitors are indirect purchasers from the defendant supplier. In the secondary line cases the injury complained of is the loss of the ability to compete with a fellow purchaser from the defendant, and it follows that the alleged preferential, or lower priced, sale must be made to such a competitor,[8] while in the primary line cases, the discriminatory higher price may be, and usually is, exacted outside the market area in which the plaintiff and defendant compete.[9]

The typical complaint against a primary line defendant, as exemplified by the leading case of *Moore v. Mead's Fine Bread Co.*,[10] depicts a large interstate combine attacking a small local competitor by reducing

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[2]Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

[3]49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

[4]*E.g.*, Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1, 7, 9 (7th Cir. 1949).

[5]See, *e.g.*, Samuel H. Moss, Inc. v. F.T.C., 148 F.2d 378 (2d Cir. 1945).

[6]See, *e.g.*, Davidson v. Kansas City Star Co., 202 F. Supp. 613 (W.D. Mo. 1962).

[7]See, *e.g.*, F.T.C. v. Morton Salt Co., 334 U.S. 27 (1947).

[8]Chicago Sugar Refining Co. v. American Sugar Refining Co., 176 F.2d 1 (7th Cir. 1949).

[9]*E.g.*, F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1959).

[10]348 U.S. 115 (1954).

prices in the market in which they compete to a loss-price level, recouping such losses through higher priced sales in other areas. The small businessman, lacking financial resources or avenues of diversification with which to offset his losses, is driven out of the market, after which the large corporation returns its prices to a profitable mark.[11] Just such predatory practices by chain-stores, unchecked by old section 2 of the Clayton Act, gave rise to the political atmosphere in which the Robison-Patman amendment had its genesis in 1936.[12] Jurisdictionally, only one of the sales relied on by the plaintiff must be in interstate commerce; and in the primary line price war just described it is sufficient if the higher priced discriminatory sale made by the defendant was made across a state line, although all the transactions directly involved in the price war were wholly intrastate, and although the discriminatory interstate sale was not destined for a market area in which the plaintiff competed.[13] In the secondary line case, on the other hand, the jurisdictional requirement of a discriminatory sale across a state line will not be met, even if a discriminatory sale is made, unless it is made into the market in which the plaintiff competes; discriminatory intrastate sales into plaintiff's area of competition will not burgeon into a federal cause of action on proof that defendant made other discriminatory sales across a state line which did not reach plaintiff's competitor.[14]

In the instant case defendant was allowed by the courts to isolate its Shelby plant from the other plants in the Ohio district, the Court of Appeals viewing interstate sales by the other plants as immaterial, in that such sales would not have been made into plaintiff's area of competition.[15] Plaintiff was denied an amendment of the original complaint, which had set forth only the intrastate discrimination, thus preventing proof that the other Ohio district plants were making discriminatory sales in commerce. The defendant being the parent corporation, and not its Shelby plant, plaintiff's original failure to allege that the other plants were making such interstate discriminatory sales cannot be the basis of the court's judgment for the defendant, since that would express an example of procedural rigidity reminiscent of common law pleading. It must be assumed instead that the court believed such an amendment would not improve plaintiff's position, not because sales by any plant other than Shelby were immaterial, but because sales by the other plants *into markets in which plaintiff did not compete* were immaterial. This assumption is fortified by the case cited by the court in support of its ruling,[16] a case dealing with secondary line competition in which plaintiff was not allowed to complain of discriminatory marketing practices imposed by its supplier because the preferential treatment given to the defendant-supplier's other customers was not given to com-

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[11] *Ibid.*

[12] See Note, 67 YALE L.J. 1073, 1075 & n.5 (1958) and materials there cited.

[13] *E.g.*, Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954-55 (10th Cir. 1959).

[14] Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951).

[15] Willard Dairy Corp. v. National Dairy Prod. Corp., 309 F.2d 943, 946 (6th Cir. 1962).

[16] Davidson v. Kansas City Star Co., 202 F. Supp. 613 (W.D. Mo. 1962).

petitors of the plaintiff.[17] In the instant case, however, plaintiff and defendant were primary line competitors. Sales in commerce by defendant's other Ohio plants into areas in which plaintiff did not compete were not only material, but constituted one of the two legs of plaintiff's cause of action; discriminatory sales into plaintiff's area of competition would have been wholly fortuitous.[18] It is submitted that the Court of Appeals erred in a fashion analogous to that of the Court of Appeals for the Seventh Circuit in its decision of *Anheuser-Busch, Inc. v. F.T.C.*,[19] and it is regrettable that the Supreme Court did not here, as there,[20] choose to grant certiorari to correct the error.

J. J. Eskridge

WILLS—HEIRS—TIME OF DETERMINATION

Testator devised a life estate to his spouse in all of the real property owned by him at his death and further provided that "upon her death one half [of the real property is] to be divided among her heirs and one half to be divided among my heirs. . . ."[1] Plaintiff, a subsequent husband of the testator's spouse and life tenant, alleges that the heirs of the testator and the life tenant should be determined at the death of the life tenant, thereby making him an heir of the life tenant. Defendant, the son of the life tenant at the death of the testator, alleges that the heirs of the testator and the life tenant should be determined at the death of the testator, thereby making him the sole heir of the life tenant. The lower court ruled that the heirs of the testator and the life tenant should be determined at the death of the life tenant. HELD: Affirmed. The heirs are to be determined at the death of the life tenant in accordance with the intent of the testator. *Dailey v. Houston*, 151 So. 2d 919 (Miss. 1963).

It is a basic rule of law that where a testator designates a class of beneficiaries in his will as heirs, they must be determined at the death of the testator, unless the will indicates otherwise.[2] The reason given for this concept is that the law favors vested over contingent remainders.[3] This rule, however, is not inflexible.[4] If an estate is devised to the heirs of someone other than the testator, for example a life tenant, the heirs will be determined at the death of the life tenant.[5] Therefore, if a will requires that an estate is to be divided between the heirs of a testator and the heirs of his life tenant, its interpretation as to when the heirs are

[17]Several other cases cited by the court also deal with secondary line competition. Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951); Danko v. Shell Oil Co., 115 F. Supp. 886 (E.D.N.Y. 1953); Lewis v. Shell Oil Co., 50 F. Supp. 547 (N.D. Ill. 1943)

[18]F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1959).

[19]265 F.2d 677 (1959).

[20]F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1959).

[1]Dailey v. Houston, 151 So. 2d 919, 921 (Miss. 1963).

[2]*E.g.*, *In re* Newman's Estate, 68 Cal. 420, 229 Pac. 898 (Dist. Ct. App. 1924).

[3]See, *e.g.*, Close v. Benham, 97 Conn. 102, 115 Atl. 626 (1921).

[4]See, *e.g.*, *In re* Warne's Estate, 302 Pa. 386, 153 Atl. 688 (1931).

[5]*E.g.*, Moseley v. Knott, 212 N.C. 651, 194 S.E. 100 (1937).

to be determined becomes questionable. This problem increases in difficulty when the life tenant, to whose heirs one-half of the estate is to be given, is the testator's spouse and sole heir at law.[6] The courts have offered three solutions to this problem.[7] The first solution would be to determine the heirs of the testator and of his life tenant at the death of the testator, thereby vesting the remainders.[8] The second solution would be to determine the heirs of the testator at his death, and the heirs of the life tenant at his death, thereby causing the remainders to vest at different times.[9] The third solution would be to determine the heirs of the testator and the life tenant at the death of the life tenant, thereby leaving the remainders contingent at the death of the testator.[10]

In applying any solution, the courts strongly adhere to the rule that the intent of the testator controls the interpretation of his will.[11] When a testator gives one-half of his estate to his heirs and one-half to the heirs of a life tenant, he expresses an intent to benefit equally two distinct classes.[12] The fact that a person is devised a life tenancy of an estate and is also an heir of the testator, may be sufficient when considered with other factors, such as the testator's intent, to support the conclusion that the possessory taker is to be excluded as an heir by determining the testator's heirs at the death of the possessory taker.[13] If the spouse of the testator, the life tenant, is allowed to take a part of the estate under the gift to his heirs, more than one-half of the estate may eventually pass to the heirs of the spouse.[14] Therefore in a situation where the spouse is well provided for in other sections of the will, for example where she has received a life estate,[15] the courts will consider it the testator's intent to exclude her as an heir,[16] and postpone the determination of the heirs until her death.[17] When the testator by will gives his spouse a life estate, there is a clear indication of his intent to exclude her as an heir at his death.[18] Since the inclusion of the spouse as an heir at the testator's death would obviously defeat the intent of the testator, the device of postponing the determination of the heirs until the death of the life tenant is frequently used.[19] The courts realize that the general rule of determining the heirs of a testator at his death is not a rule of substantive law,[20] but a rule of interpretation, and should not be used to defeat the intent of the testator.[21]

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[6]Miss. Code Ann. § 470 (1956).

[7]See Annot., 19 A.L.R.2d 371 (1951).

[8]See Jones v. Knappen, 63 Vt. 391, 22 Atl. 630 (1891).

[9]See, *e.g.*, Burton v. Kinney, 191 Tenn. 1, 231 S.W.2d 356 (1950).

[10]See, *e.g.*, Craig v. McFadden, 191 S.W. 203 (Tex. Civ. App. 1916).

[11]See, *e.g.*, Jones v. Petrie, 156 Kan. 241, 132 P.2d 396 (1943).

[12]5 American Law of Property § 22.59 (Casner ed. 1952).

[13]See, *e.g.*, *In re* Barnard's Estate, 351 Pa. 313, 41 A.2d 578 (1945).

[14]5 American Law of Property § 22.59 (Casner ed. 1952).

[15]See, *e.g.*, Craig v. McFadden, 191 S.W. 203 (Tex. Civ. App. 1916).

[16]See, *e.g.*, Mitchell v. Vest, 157 Iowa 336, 136 N.W. 1054 (1912).

[17]See, *e.g.*, Craig v. McFadden, 191 S.W. 203 (Tex. Civ. App. 1916).

[18]See, *e.g.*, *In re* Barnard's Estate, 351 Pa. 313, 41 A.2d 578 (1945).

[19]Casner, *Construction Of Gifts To "Heirs" And The Like*, 53 Harv. L. Rev. 207, 240 (1939).

[20]See Heard v. Read, 169 Mass. 216, 47 N.E. 778 (1897).

[21]See, *e.g.*, Jones v. Petrie, 156 Kan. 241, 132 P.2d 396 (1943).

The result of this decision is acceptable when considered upon the facts of this particular case. The death of the life tenant vested a one half interest in the takers on the testator's side after only four years of contingency. The rule of this decision, however, should not be considered a hard and fast rule for every case involving a comparable factual situation. There is always a possibility that the life tenant may survive the testator for a greater number of years. Would it be reasonable to keep the one-half interest of the testator's next of kin contingent for an extended period, and deprive them of the benefits they may be able to derive from it in consequence of vested rights? When the intent of the testator is clear the device of determining "heirs" of the testator as of a time remote from his death is unnecessary. In this particular case there seems nothing to suggest that the testator wished to defer vesting in his relatives until the death of the life tenant. Therefore, the use of "fictions" or "devices" in order to carry out the perfectly obvious intent of the testator is unnecessary.

Henry S. Davis, Jr.

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R. Gordon Grantham
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BOOKS RECEIVED

An Introduction to International Law. 5th Edition. J. G. Starke. Washington: Butterworth, Inc., 1963. Pp. 524. $9.00.

Encyclopedia of Tax Shelter Practices. Publisher's Editorial Staff. New Jersey: Prentice-Hall, Inc., 1963. Pp. 1013. $29.95.

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